TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 66.

REUBEN L. MARTIN, PLAINTIFF IN ERROR,

vs.

THE PITTSBURG AND LAKE ERIE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JULY 1, 1905.

(19,823.)

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SUPREME COURT OF THE UNITED STATES.

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REUBEN L. MARTIN, PLAINTIFF IN ERROR,

vs.

THE PITTSBURG AND LAKE ERIE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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Supreme Court of the State of Ohio.

THE STATE OF OHIO, *City of Columbus:*

To the Honorable, the Supreme Court of the United States:

Pursuant to the command of your within Writ of Error, directed to us, we, under our Seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the Judges within named in a certain authenticated transcript to this Writ attached, send, as within we are commanded.

In witness whereof, I, Lawson E. Emerson Clerk of the Supreme Court of Ohio, have set my hand and Seal of said Court this 23rd day of June, A. D. 1905.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk, Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

In the Supreme Court of Ohio.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Entry of Certification.

On motion of said plaintiff in error, Reuben L. Martin, this Court in addition to the orders heretofore made herein, order it to be certified and made part of the record of this case and of the judgment of affirmance heretofore entered herein, that the defense interposed by the defendant to the cause of action of the plaintiff herein is founded upon the Act of the Assembly of the State of Pennsylvania of April 4, 1868, P. L., 58.

It is further certified that said plaintiff in error set up in his amended reply to the answer, filed in the Court of Common Pleas of Mahoning County, Ohio, and in his petition in error in the Circuit Court of Mahoning County, Ohio and in his petition in error in the Supreme Court of Ohio, asking a reversal of the judgment of the Circuit Court of Mahoning County, Ohio, that said Act of the Assembly of the State of Pennsylvania of March 4, 1868, P. L., 58, and the proceedings of said Court of Common Pleas and Circuit Court of Mahoning County, Ohio, had thereunder, was repugnant to the portion of the Eighth Section of Article One of the Constitution of the United States, wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states and that Congress shall have power to es-

tablish postoffices and postroads. Also that said act and the proceedings had thereunder were claimed and set up by plaintiff in error, in the manner hereinbefore referred to, to be repugnant to that portion of the First Section of Article Fourteen of the Amendments to the Constitution of the United States, whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty
c or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

That said judgment of affirmance was in favor of the validity of said statute and of said proceedings had thereunder, and that they were not repugnant to any of the said provisions of said Constitution or of the Amendments thereto. That said plaintiff in error duly excepted to said judgment of affirmance. That it became material to the determination of said case in this Court to determine said question so made by plaintiff in error, which was determined adversely to plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein.

It is further certified that this Court is the highest court of law or equity in the State of Ohio in which a decision can be had in this state.

d [Endorsed:] In the Supreme Court of Ohio. Reuben L. Martin, Plaintiff in Error, *vs.* The Pittsburgh & Lake Erie Railroad Company, Defendant in Error. Entry of Certification. Filed Supreme Court of Ohio Jun- 9th 1905. L. E. Emerson, Clerk. Entered J. 20 p. 316.

e Petition for Writ of Error from Supreme Court of United States to the Supreme Court of the State of Ohio.

Supreme Court of Ohio.

Case No. 9239.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Petition for Writ of Error.

To the Honorable William Z. Davis, Chief Justice of the Supreme Court of the State of Ohio:

Your petitioner, Reuben L. Martin, respectfully shows:

That heretofore, to-wit: on May 16th A. D., 1905, the Supreme Court of the State of Ohio affirmed the judgment herein of the Common Pleas and Circuit Courts of Mahoning County, State of Ohio, which judgment of affirmance was a final order made by the

highest court of the State of Ohio; and the highest court of the State of Ohio having jurisdiction of said case, in which a decision could be had. And in which final order and judgment, and the proceedings had prior thereunto in this case in said Common Pleas and Circuit Courts of Mahoning County, State of Ohio, certain errors were committed to the prejudice of said Reuben L. Martin, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Petitioner further represents that there was drawn in question in said cause the following matters, to-wit:

Your petitioner, as plaintiff, brought this action in the Court of Common Pleas of Mahoning County, Ohio, to recover compensation for certain injuries sustained by him while riding in the
f performance of his duties as a railway postal clerk, with all the rights of a passenger, in one of the defendant's trains in the State of Pennsylvania, en route from the City of Cleveland in the State of Ohio to the City of Pittsburg, in the State of Pennsylvania, and return; that said injuries were received by him by reason of the negligence of one or more of the crew of a work train, subordinate servants under the control and in the employment of The Pittsburg & Lake Erie Railroad Company, in permitting a switch leading from the main track into a side track to be open, whereby the train upon which plaintiff was performing his duties as railway postal clerk was derailed and wrecked. That defendant, in the answer by it filed, interposed as a defense to said action the act of the assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, alleging that by virtue of the provisions of said statute the rights of the plaintiff, while travelling in the State of Pennsylvania, were those only of an employé of the railroad company. That plaintiff replied to this defense that said statutory provision, if it has application to his rights and those sought by him to be enforced in this action, is in contravention of the provisions of the Constitution of the United States hereinafter referred to. And thereupon the case was tried in the Court of Common Pleas of Mahoning County in the State of Ohio to a judge then and there presiding as the trial judge of said court and to a jury and the jury after the submission of the evidence on the part of the parties, upon the direction of said trial judge so to do,—said court holding that said statute interposed by defendant in its answer as aforesaid was a good defense to plaintiff's claim and defeated his right to recover from said defendant—returned its verdict for the defendant; that judgment was rendered by said court upon said verdict; and thereupon the circuit court of said Mahoning County, in the State of Ohio, took jurisdiction of said case and tried the case brought into said court by proceeding
g in error, and found and entered upon its journal a judgment affirming the judgment of the Court of Common Pleas rendered as aforesaid; that said finding and judgment was affirmed by said Supreme Court of Ohio as aforesaid; that there was in each and all of the judgments rendered as aforesaid drawn in question the validity of said statute of the State of Pennsylvania, to-wit, the Act of April 4, 1868, P. L. 58, on the ground of its being repugnant to

the Constitution of the United States, and the decision of each and all of said courts so rendering said judgments as aforesaid, are in favor of the validity of said statute.

Your petitioner further shows that the Federal question was made in his amended reply to the answer of the defendant in the Court of Common Pleas, in his petition in error in the Circuit Court and in his petition in error in the Supreme Court of Ohio, namely:

First. Whether said act of the General Assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, is repugnant to the 8th section of Article one of the Constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states, and wherein and whereby it is provided that congress shall have power to establish post offices and post roads.

Second. Whether said Act of the General Assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, is repugnant, to the first section of Article 14 of the amendments to the Constitution of the United States whereby it is provided that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner further says that a Federal question was made in said case, to-wit, as hereinbefore set out, that said judgment of said Supreme Court of Ohio, was repugnant to the Constitution of the United States, and repugnant to the amendments thereto in the respects hereinbefore referred to; and that a decision of said Federal questions was necessary to the judgment rendered.

Your petitioner files herewith his assignment of errors.

Wherefore your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of Ohio in said case and prays that a writ of error to said Supreme Court of Ohio be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of Ohio be reversed, vacated and held for naught, and that he may be restored to all things that he has lost by reason of said final judgments.

REUBEN L. MARTIN, *Petitioner,*
By MURRAY & KOONCE,
His Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 7th day of June, A. D. 1905, and the bond is hereby fixed at the sum of $300.00.

Dated at Columbus, Ohio, this 7th day of June, A. D. 1905.

WILLIAM Z. DAVIS,
Chief Justice of the Supreme Court of Ohio.

i [Endorsed:] Supreme Court of Ohio. Reuben L. Martin *vs.* The Pittsburg & Lake Erie Railroad Company. Petition for writ of error from Supreme Court of United States. Filed Supreme Court of Ohio Jun- 17 1905. L. E. Emerson, Clerk. Murray & Koonce, attorneys at law, Youngstown, Ohio.

j In the Supreme Court of Ohio.

REUBEN L. MARTIN
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

Now comes Reuben L. Martin, Plaintiff in error, and files the following assignment of errors, which, he alleges, intervened to his prejudice in the proceedings had, and the judgment rendered by the Supreme Court of Ohio on the 16th day of May, A. D., 1905, to which he duly excepted.

First. That said judgment of said Court of Common Pleas of Mahoning County, Ohio, and of said Circuit Court of said County and State affirming the same, and said judgment of affirmance of the Supreme Court of the State of Ohio violate in effect, and are repugnant to, that portion of the 8th section of article one of the constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

Second. That said judgment of said Court of Common Pleas of Mahoning County, Ohio, and of the Circuit Court of said County and State affirming the same, and said judgment of affirmance of the Supreme Court of the State of Ohio violate in effect, and are repugnant to, that portion of the 8th section of article one of the Constitution of the United States whereby it is provided that Congress shall have power to establish post offices and post roads.

Third. That said judgment of said Court of Common Pleas of Mahoning County, Ohio, and of the said Circuit Court of said
k County and State affirming the same, and said judgment of affirmance of the Supreme Court of the State of Ohio violate in effect, and are repugnant to that portion of the first section of article fourteen of the amendments to the Constitution of the United States whereby it is providid that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth. That said Supreme Court of Ohio erred in finding and adjudging that the act of assembly of the State of Pennsylvania of April 4, 1868, P. L. 58; was not in contravention of, and repugnant to, that portion of the 8th section of article one of the constitution of the United States wherein and whereby it is provided that Con-

gress shall have power to regulate commerce with foreign nations and among the several states.

Fifth. That said Supreme Court of Ohio erred in finding and adjudging that the act of the Assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, was not in contravention of, and repugnant to, that portion of the 8th section of article one of the constitution of the United States whereby it is provided that congress shall have power to establish post offices and post roads.

Sixth. That said Supreme Court of Ohio erred in finding and adjudging that the act of assembly of Pennsylvania of April 4, 1868, P. L. 58, was not in contravention of, and are repugnant to, that portion of the first section of article fourteen of the amendments of the constitution of the United States whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

l Seventh. That said Supreme Court of Ohio erred in finding and adjudging that the act of assembly of the state of Pennsylvania of April 4, 1868, P. L. 58, was not in contravention of, and repugnant to, that portion of the first section of Article fourteen of the Amendments to the Constitution of the United States whereby it is provided that no state shall deprive any person of life, liberty or property without due process of law.

Eighth. That said Supreme Court of Ohio erred in finding and adjudging that the act of Assembly of the State of Pennsylvania of April 4, 1868, P. L. 58 was not in contravention of, and repugnant to, that portion of the first section of article fourteen of the Amendments to the constitution of the United States whereby it is provided that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws.

Ninth. That by the record in this case it appears that the judgment aforesaid given by said Supreme Court of Ohio, affirming the judgment rendered by the Circuit Court and Court of Common Pleas, of the County of Mahoning and State of Ohio, was given for the said Pittsburg & Lake Erie Railroad Company against the said Reuben L. Martin, whereas, by the law of the land the said judgment ought to have been given for the said Reuben L. Martin, against the said Pittsburg & Lake Erie Railroad Company.

Wherefore said plaintiff in error prays that said judgment against him may be reversed, annulled and held for naught, and that he may be restored to all things which he has lost by occasion of said judgment.

MURRAY & KOONCE,
Attorneys for Plaintiff in Error.

m [Endorsed:] In Supreme Court of Ohio. Reuben L. Martin *vs.* The Pittsburg & Lake Erie Railroad Company. Assignment of errors on writ of error from the Supreme Court of the United States to the Supreme Court of Ohio. Filed Supreme Court of Ohio Jun- 17 1905. L. E. Emerson, Clerk. Murray & Koonce, attorneys at law, Youngstown, Ohio.

n In the Supreme Court of Ohio.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Bond on Writ of Error from Supreme Court of the United States to the Supreme Court of the State of Ohio. (Bond Executed in Duplicate.)

Know all men by these presents that we, Reuben L. Martin, and Charles Koonce, Jr., R. B. Murray, and S. D. Currier, as sureties, are held and firmly bound unto The Pittsburg & Lake Erie Railroad Company in the full and just sum of Three Hundred Dollars ($300), to be paid to the said The Pittsburg & Lake Erie Railroad Company, its successors or assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 6th day of June, A. D. 1905.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to o make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

REUBEN L. MARTIN . [SEAL.]
CHARLES KOONCE, JR. [SEAL.]
ROBERT B. MURRAY. [SEAL.]
S. D. CURRIER. [SEAL.]

I hereby cer[illegible]that the foregoing signers of said bond are good for the amount named in the bond.

J. HOWARD EDWARDS,
Clerk of Courts of Mahoning County, Ohio.

I hereby approve the foregoing bond and sureties this 7th day of June, A. D. 1905.

WILLIAM Z. DAVIS,
Chief Justice of the Supreme Court of the State of Ohio.

p [Endorsed:] In Supreme Court of Ohio. Reuben L. Martin, Plaintiff in Error, *vs.* The Pittsburg & Lake Erie —, Defendant in Error. Bond on writ of error from Supreme Court of the United States to the Supreme Court of the State of Ohio. (Bond executed in duplicate.) Filed Supreme Court of Ohio Jun- 17 1905. L. E. Emerson, Clerk. Murray & Koonce, attorneys at law, Youngstown, Ohio.

q Supreme Court of the State of Ohio.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Order Allowing Writ of Error from Supreme Court of United States to the Supreme Court of the State of Ohio.

The above entitled matter coming on to be heard upon the petition of the said Reuben L. Martin, plaintiff in error therein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, and upon examination of said petition and the record in said matter, and desiring to give the petitioner, Reuben L. Martin, an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and hereby is, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same hereby is, approved.

WILLIAM Z. DAVIS,
Chief Justice of the Supreme Court of the State of Ohio.

r [Endorsed:] Supreme Court of the State of Ohio. Reuben L. Martin, Plaintiff in Error, *vs.* The Pittsburg & Lake Erie Railroad Company, Defendant in Error. Order allowing writ of error from Supreme Court of United States to the Supreme Court of the State of Ohio. Filed Supreme Court of Ohio Jun- 17 1905. L. E. Emerson, Clerk. Murray & Koonce, attorneys at law, Youngstown, Ohio.

s *Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

THE UNITED STATES OF AMERICA, *ss:*

To the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Ohio, before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in said suit between Reuben L. Martin, plaintiff in Error, and The Pittsburg & Lake Erie Railroad Company, defendant in error, being case No. 9239 in the Supreme Court of Ohio, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or

wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the Constitution, amendments, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or amendments, or of a treaty, or statute of, or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, amendment, treaty, statute or commission, a manifest error hath happened to the great damage of said plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given,
t that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of July A. D. 1905, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 7th day of June, A. D. 1905.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD,
Clerk of the Circuit Court of the United States
for the Northern District of Ohio,
By B. C. MILLER,
Deputy Clerk.

Allowed by:
WILLIAM Z. DAVIS,
Chief Justice of the Supreme Court of
the State of Ohio.

u [Endorsed:] Writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Reuben L. Martin, Plaintiff in Error, *vs.* The Pittsburg & Lake Erie Railroad Company, Defendant in Error. Filed Supreme Court of Ohio Jun- 17 1905. L. E. Emerson, Clerk. Murray & Koonce, attorneys at law, Youngstown, Ohio.

v In the Supreme Court of Ohio.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Citation on Writ of Error from Supreme Court of United States to the Supreme Court of the State of Ohio.

UNITED STATES OF AMERICA, *ss:*

To The Pittsburg & Lake Erie Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, at Washington, within fifty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Ohio, wherein Reuben L. Martin is plaintiff in error, and you are the defendant in error, it being case No. 9239 in the Supreme Court of Ohio, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Z. Davis, Chief Justice of the Supreme Court of the State of Ohio, this 8th day of June, A. D. 1905.

WILLIAM Z. DAVIS,
Chief Justice of the Supreme Court of the State of Ohio.

w [Endorsed:] In the Supreme Court of Ohio. Reuben L. Martin, Plaintiff in Error, *vs.* The Pittsburg & Lake Erie Railroad Company, Defendant in Error. Citation on writ of error from Supreme Court of United States to the Supreme Court of the State of Ohio. Filed Supreme Court of Ohio Jun- 17 1905. L. E. Emerson, Clerk. Murray & Koonce, attorneys at law, Youngstown, Ohio.

x *Return of Service of Copy of Citation and of Writ of Error.*

Supreme Court of the United States to the Supreme Court of Ohio.

Case No. 9239.

REUBEN L. MARTIN, Plaintiff in Error,

vs.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Return on Citation. Affidavit.

UNITED STATES OF AMERICA.

THE STATE OF OHIO, *Mahoning County, ss:*

On this 19th day of June, in the year of our Lord, One Thousand Nine Hundred and Five, personally appeared before me, the Clerk of the Circuit Court and Court of Common Pleas of Mahoning County, State of Ohio, Frank L. De Normandie, Sheriff of said County, and makes oath that he delivered to John Roberts a regular ticket agent for The Pittsburg & Lake Erie Railroad Company at Youngstown, Mahoning County, Ohio (after having made diligent search for and being unable to find, the President, Secretary, Treasurer, Clerk or any other chief officer of said The Pittsburg & Lake Erie Railroad Company within said County), a true copy of the original writ of error in this case duly certified as such by the Clerk of the Supreme Court of Ohio and a true copy of the within original citation in this case duly certified as such by the Clerk of the Supreme Court of Ohio. Said copy of the writ of error and said copy of said citation being under the seal of the Supreme Court of Ohio, and both of said copies were delivered to said John Roberts personally, this 19th day of June, A. D. 1905; the said affiant further makes

y oath that he delivered to James P. Wilson, Attorney of Record in the above entitled case for the defendant in error in the Court of Common Pleas and Circuit Court and Supreme Court of Ohio, a true copy of the original writ of error in this case duly certified as such by the Clerk of the Supreme Court of Ohio and also that he at the same time delivered to him a true copy of the original citation in this case duly certified as such by the Clerk of the Supreme Court of Ohio, said copy of said writ of error and said copy of said citation being under the seal of the Supreme Court of Ohio, and both of said copies were delivered to the said James P. Wilson, personally, this 19th day of June, A. D. 1905.

FRANK L. DE NORMANDIE,
Sheriff of Mahoning County, Ohio.

Sworn to and subscribed before me at the City of Youngstown, Mahoning County, Ohio, this 19th day of June, A. D. 1905.

[Seal Common Pleas Court, Mahoning County, Ohio.]

J. HOWARD EDWARDS,
Clerk of the Court of Common Pleas of Mahoning County, Ohio.

z [Endorsed:] From the Supreme Court of the United States to the Supreme Court of Ohio. Reuben L. Martin *vs.* The Pittsburg & Lake Erie Railroad Company. Sworn return of service of certified copies of writ of error and of Citation. Filed Supreme Court of Ohio Jun- 20 1905. L. E. Emerson, Clerk. Murray & Koonce, attorneys at law, Youngstown, Ohio.

& In the Supreme Court of Ohio.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Record.

Murray & Koonce and W. S. Anderson, Attorneys for Plaintiff in Error.
J. P. Wison, Attorney for Defendant in Error.

Filed Supreme Court of Ohio Nov. 19 1904.
L. E. EMERSON, *Clerk.*

1 In the Supreme Court of Ohio.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Petition in Error.

The plaintiff in error, Reuben L. Martin, as his cause and grounds for this error proceeding against the defendant in error, The Pittsburg & Lake Erie Railroad Company, says: That at the May Term, A. D. 1904, of the Court of Common Pleas within and for the County of Mahoning and State of Ohio, and on the 26th day of May A. D. 1904, a final judgment was rendered in and by said Court of Common Pleas in favor of said defendant in error and against said plaintiff in error in a certain civil action then pending therein, wherein this plaintiff in error was plaintiff and said defendant in error was defendant; and that at the October Term, A. D. 1904, of the Circuit Court in and for said County of Mahoning and State of Ohio, and on the 17th day of October, 1904, a final judgment, affirming in all respects said final judgment, rendered as aforesaid in and by said Court of Common Pleas, was rendered by said Circuit Court in favor of said defendant in error against said plaintiff in error, and for costs but without penalty, in a certain error proceeding which was duly and legally commenced in said Circuit Court on the 19th day of

July, 1904, and which was then in said Circuit Court pending
2 on said 17th day of October, 1904, and in which this plaintiff in error was plaintiff in error, and said defendant in error was defendant in error, and that this plaintiff in error files herewith, marked "Exhibit A" and makes a part of this petition in error all the original files, papers and pleadings, filed in said action in said Court of Common Pleas, and, also the original bill of exceptions taken by this plaintiff in error, and allowed, signed and sealed by the Trial Judge holding said May Term of said Court of Common Pleas, and also, a true and correct transcript, duly certified, of all the docket and journal entries made in said action in said Court of Common Pleas, and of the record and proceedings of said Court of Common Pleas in said action, and also all the original files, papers, and pleadings filed in said error proceeding in said Circuit Court, and, also, a true and correct transcript, duly certified, of all the docket and journal entries made in said error proceeding in said Circuit Court and of the record and proceeding of said Circuit Court in said error proceeding.

This plaintiff in error further says that there is manifest error to the prejudice of this plaintiff in error in said record and proceedings of said Court of Common Pleas in said action, and of said Circuit Court in said error proceeding, in this, to-wit:—

First That the Court erred in the trial of said cause in the admission of evidence offered by the defendant over the objection of the plaintiff to which ruling of the Court plaintiff at the time excepted.

Second. That the Court erred in its charge to the jury.

Third. That the Court erred in refusing to charge the jury as requested by the plaintiff.

Fourth. That the verdict is contrary to the law and evidence.

Fifth. That the Court of Common Pleas erred in overruling the motion of this plaintiff for a new trial.

Sixth. That the verdict and judgment is contrary to the law and the evidence because the statutory provision (to-wit: The Act of the Assembly of Pennsylvania of April 4, 1868, P. L. 58, on
3 which the defendant in error based its defense that said plaintiff in error was not entitled to recover for the negligence of the defendant and its employes, and that plaintiff in error did not at the time of his injuries possess the rights of a passenger, and which defense was by the said Court of Common Pleas and by the Circuit Court held and adjudged to be a valid defense) is invalid and void for the reason that it is in conflict with that portion of the 8th Section of Article 1 of the Constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

Seventh. That the verdict and judgment is contrary to the law and the evidence because the statutory provision (to wit: The Act of the Assembly of Pennsylvania of April 4, 1868, P. L. 58, on which the defendant in error based its defense that said plaintiff in error was not entitled to recover for the negligence of the defendant and its employes, and that plaintiff in error did not at the time of his injuries possess the rights of a passenger, and which defense was

by said Court of Common Pleas and by the Circuit Court held and adjudged to be a valid defense) is invalid and void for the reason that it is in conflict with that portion of the 8th Section of Article 1 of the Constitution of the United States, whereby it is provided that Congress shall have power to establish postoffices and postroads..

Eighth. That the verdict and judgment is contrary to the law and the evidence because the statutory provision (to-wit: The Act of the Assembly of Pennsylvania of April 4, 1869, P. L. 58, on which the defendant in error based its defense that said plaintiff in error was not entitled to recover for the negligence of the defendant and its employes, and that the plaintiff in error did not at the time of his injuries possess the rights of a passenger, and which defense was by the said Court of Common Pleas and by the Circuit Court held and adjudged to be a valid defense) is invalid and void for the reason that it is in conflict with that portion of the first Section of Article 14 of the Amendments to the Constitution of the United States whereby it is provided that no state shall make or enforce
4 any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person, of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wherefore, This plaintiff in error prays that said final judgment of said Court of Common Pleas may be reversed, vacated, and held for naught, and that said final judgment of said Circuit Court may be reversed, vacated and held for naught, and that he may be restored to all things that he has lost by reason of said final judgments, and that he may have such other and further relief as justice and equity may require.

MURRAY & KOONCE,
Attorneys for Plaintiff in Error.

Waiver.

Now comes The Pittsburg & Lake Erie Railroad Company, defendant in error in the above entitled error proceeding, by James P. Wilson, its Attorney of Record in the original case, and also attorney of record in the error proceedings in the Circuit Court and in this Court, and waives the issuing and service of summons in error in this proceeding and enters the voluntary appearance of The Pittsburg & Lake Erie Railroad Company herein.

J. P. WILSON,
Attorney for Defendant in Error.

October 24, 1904.

5 *Docket Entries.*

Circuit Court Appearance Docket, No. 2, Mahoning County, Ohio.

Error. Common Pleas No. 22971.

Murray & Koonce and W. S. Anderson, for plaintiff in error.
J. P. Wilson, for defendant in error.

REUBEN L. MARTIN
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY.

July 19, 1904. Petition in Error, Waiver, Transcript, Original Papers and Bill of Exceptions filed.

October Term, 1904.

October 17, 1904. Hearing. Affirmed, without penalty at costs of Plaintiff in Error, and remanded. J. 4, P. 373.

Journal Entries.

Journal 4, page 373, October term, A. D. 1904, to-wit: October 17th.

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Petition in Error, together with the origi-al papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Mahoning County, Ohio, in the case of Reuben L. Martin *vs.* The P. & L. E. R. R. Co., and was argued by counsel. Upon consideration whereof the Court find that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas.

6 It is thereupon considered, ordered and adjudged by this Court that the judgment and proceedings of the said Court of Common Pleas, in said action be, and the same are hereby, in all things, affirmed; there being, however, in the opinion of the Court, reasonable ground for this proceeding in error, no penalty is assessed.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $——, for which execution is awarded; and that a special mandate be sent to the Court of Common Pleas, of Mahoning County, to carry this judgment into execution.

To all of which holdings, orders and judgment the plaintiff in error excepts.

THE STATE OF OHIO, *Mahoning County, ss:*

Circuit Court.

REUBEN L. MARTIN
vs.
THE P. & L. E. R. R. Co.

Certificate to Transcript.

I, J. Howard Edwards, Clerk of the Circuit Court, within and for said County and State, having in my official care and custody the records and files of said Court, do hereby certify that the foregoing is a full and correct transcript of all the docket and journal entries in the above entitled case; that the pleadings and papers hereto attached are the original pleadings and papers filed in this case.

Witness my signature as such Clerk and the seal of said Court at Youngstown, this 24th day of October, 1904.

[SEAL.] J. HOWARD EDWARDS *Clerk,*
By HUGH SWANEY, *Deputy.*

7 THE STATE OF OHIO, *Mahoning County, ss:*

In the Circuit Court.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Petition in Error.

The plaintiff in error, Reuben L. Martin, as his cause and grounds for this error proceeding against the defendant in error, The Pittsburg & Lake Erie Railroad Company, says, that at the May term, A. D., 1904, of the Court of Common Pleas within and for the County of Mahoning and State of Ohio, and on the 26th day of May, A. D. 1904, a final judgment was rendered in and by said Court of Common Pleas in favor of said defendant in error and against said plaintiff in error in a certain civil action then pending therein wherein this plaintiff in error was plaintiff and said defendant in error was defendant; that this plaintiff in error files herewith, marked "Exhibit A" and makes a part of this petition in error, all the original files, papers and pleadings in said action in said Court of Common Pleas, and also the original bill of exceptions taken by this plaintiff in error, and allowed, signed and ordered to be made a part of the record by the Trial Judge holding said term of said Court of Common Pleas, and also a true and correct transcript duly certified, of all the docket and journal entries made in said action in said Court of the record and proceedings of said Court of Common Pleas in said action.

This plaintiff in error further says that there is manifest error to his prejudice in said record and proceedings of said Court of Common Pleas in his action in this, to-wit:

First. That the Court erred in the trial of said cause in the admission of evidence offered by the defendant over the objection of the plaintiff to which ruling of the Court plaintiff at the time excepted.

Second. That the Court erred in its charges to the jury.

8 *Third.* That the Court erred in refusing to charge the jury as requested by the plaintiff.

Fourth. That the verdict is contrary to the law and the evidence.

Fifth. That the Court of Common Pleas erred in overruling the motion of this plaintiff for a new trial.

Sixth. That the verdict and judgment is contrary to the law and the evidence because the statutory provision (to-wit: The Act of the Assembly of Pennsylvania of April 4, 1868, P. L. 58, on which the defendant in error based its defense that said plaintiff in error was not entitled to recover for the negligence of the defendant and its employes, and that plaintiff in error did not at the time of his injuries possess the rights of a passenger, and which defense was by the said Court of Common Pleas held and adjudged to be a valid defense) is invalid and void for the reason that it is in conflict with that portion of the 8th Section of Article 1 of the Constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

Seventh. That the verdict and judgment is contrary to the law and the evidence because of statutory provision (to-wit: The Act of the Assembly of Pennsylvania of April 4, 1868, P. L. 58, on which the defendant in error based its defense that said plaintiff in error was not entitled to recover for the negligence of the defendant and its employes, and that plaintiff in error did not at the time of his injuries possess the rights of a passenger, and which defense was by the said Court of Common Pleas held and adjudged to be a valid defense) is invalid and void for the reason that it is in conflict with that portion of the 8th Section of Article 1 of the Constitution of the United States whereby it is provided that congress shall have power to establish post offices and post roads.

Eighth. That the verdict and judgment is contrary to the law and the evidence because the statutory provision (to-wit: The Act of the Assembly of Pennsylvania of April 4, 1868, P. L. 58, on which the defendant in error based its defense that said plaintiff in error

9 was not entitled to recover for the negligence of the defendant and its employes, and that the plaintiff in error did not at the time of his injuries possess the rights of a passenger, and which defense was by the said Court of Common Pleas held and adjudged to be a valid defense) is invalid and void for the reason that it is in conflict with that portion of the first Section of Article 14, of the Amendments to the Constitution of the United States whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due pro-

cess of law; or deny to any person within its jurisdiction the equal protection of the laws.

Wherefore, This plaintiff in error prays that said judgment of said Court of Common Pleas may be reversed, vacated, set aside and held for naught, and that he may be restored to all things which he has lost by reason thereof, and that he may have such other relief as justice and equity may require.

MURRAY & KOONCE AND
W. S. ANDERSON,
Attorneys for Plaintiff in Error.

Waiver.

Now comes The Pittsburg & Lake Erie Railroad Company, defendant in error in the above entitled error proceedings, by James P. Wilson, its attorney of record in the original action, and also as attorney in this error proceeding and waives the issuing and service of summons in error in this proceeding and enters the voluntary appearance of The Pittsburg & Lake Erie Railroad Company herein.

J. P. WILSON,
Attorney for Defendant in Error.

July 16th, 1904.

10 *Docket Entries.*

Appearance Docket No. 43, Court of Common Pleas, Mahoning County, O.

Damages. Amount Claimed $25,000.00. C. P. No. 22971.

REUBEN L. MARTIN
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY.

January Term, 1903.

April 4, 1903. Petition and Precipe filed. Summons issued. Undertaking for costs endorsed on petition (S. D. Currier.)

April 13, 1903. Summons returned and filed, endorsed. Received this writ April 4th, A. D., 1903, and pursuant to its command on the 7th day of April, A. D., 1903, I notified the within named defendant, The Pittsburg & Lake Erie Railroad Company by delivering to C. B. Leach a regular ticket agent for said defendant Company, at Youngstown, Ohio, a true and certified copy thereof with the endorsements thereon after having made diligent search for and being unable to find the President, Secretary, Treasurer, Clerk or any other chief officer of said defendant Company within said County.

JAMES M. THOMAS, *Sheriff.*

Fees, $1.75.
Continued.
April 27. Answer filed.

May Term, 1903.

July 1. Deposition taken on behalf of plaintiff, filed. Continued.

September Term, 1903.

November 16. Continued. J. 80, P. 331.

11 January Term, 1904.

Continued.

May Term, 1904.

May 2. Leave to amend reply by 2nd Monday. J. 82, P. 4.
May 9. Amended reply filed.
May 25. Trial by jury. Jury sworn, etc. Verdict for defendant. J. 82, P. 163.
May 25. Verdict filed.
May 26. Motion for new trial filed.
May 26. Motion for new trial overruled. Plaintiff excepts. Judgment on verdict for defendant *vs.* plaintiff for costs. Plaintiff excepts and is allowed 40 days to file bill of exceptions. J. 82, P. 171.
July 1. Bill of Exceptions filed.
July 1. By consent of adverse party endorsed upon bill of exceptions, said bill of exceptions is transmitted to Hon. George F. Robinson, Trial Judge.
July 1. Bill of exceptions returned to the Clerk and filed.

Journal Entries.

J. 80, P. 331, September Term, A, D., 1903, to-wit: November 16th. This cause is continued to the next term of this Court.
J. 82, P. 4, May term, A,. D., 1904, to-wit: May 2nd. Plaintiff has leave to amend reply by second Monday.
J. 82, P. 163, May term, A. D. 1904, to-wit: May 25th. This day come the parties by their attorneys, also come the following named persons as jurors, to-wit:

1. Frank Barclay
2. R. P. Berry
3. James Butler
4. Oliver E. Jones
5. Robert McIntosh
6. Al McCready
7. A. Fairgrieve
8. Christ Hawker
9. George Blunt
10. C. C. Hurbert
11. H. M. Toy
12. A. W. Kennedy

12 who were duly impaneled and sworn according to law and the trial proceeded. And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retired to their room in custody of the Sheriff for deliberation. And after due deliberation said jury returned in open Court and report their verdict in writing signed by their foreman, to-wit:

We, the jury in the above entitled cause, find the issues joined by the pleadings for the defendant.

A. W. KENNEDY, *Foreman.*

J. 82, P. 171, May term, A. D. 1904, to-wit: May 26th.

This day this cause came on for hearing on motion of the plaintiff to set aside the verdict of the jury heretofore rendered herein, and to grant a new trial, the Court, on consideration thereof, overruled the same. Plaintiff excepts.

It is therefore considered by the Court that the defendant recover from the plaintiff its costs herein expended; and that the plaintiff pay his own costs.

To all of which the plaintiff duly excepts and is allowed forty days from and after this date in which to prepare and file his bill of exceptions herein, which, when filed and allowed by the Court, shall be a part of the record herein, but not be recorded.

THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY.

Petition.

Now comes the plaintiff, Reuben L. Martin, and for his cause of action against the defendant, The Pittsburg & Lake Erie Railroad Company, says, that at all the times hereinafter set forth the
13 defendant, The Pittsburg & Lake Erie Railroad Company, was an association of persons duly incorporated and organized as a Railroad Corporation under the laws of the State of Ohio, and as such now is, and at all the times hereinafter referred to was the owner of a railroad extending from the City of Youngstown in the State of Ohio, to the City of Pittsburg in the State of Pennsylvania, and was and is operating the same as a carrier of freight and passengers.

Plaintiff further says that on the 24th day of June, 1901, and for a long time prior thereto, he was employed by the United States of America as a Railroad Postal Clerk, and that his contract with the United States of America as such was made within the State of Ohio; that for a long time prior to said last named date, and ever since, there existed a contract and arrangement between the government of the United States of America and said defendant, by the terms of which the said defendant agreed and was bound to transport and carry the mail of said government over its said railroad, and also to transport and carry such duly authorized Railway Postal Clerks as may be placed in charge of the same by the Postal Department of such government, all of which was to be performed by the defendant company for hire and reward to be paid by the Postal Department of said government, the exact terms of which agreement the plaintiff

is unable to set forth for the reason that under and by virtue of the rules of the Postal Department of said government the same cannot be obtained from the department without an order of court.

Plaintiff further says that on said 24th day of June, 1901, while in the performance of his duties as such Railway Postal Clerk upon one of defendant's fast passenger trains near a station on defendant's road called Monaca, the said train and the car in which he was performing his duties, while running at a high rate of speed, was derailed at or near a switch and the locomotive and cars composing the train were thrown over a high embankment and the plaintiff thereby received a severe injury to the lower part of his back and spine; that he also received a severe injury to his head, especially the top thereof; that he also suffered injury to his left leg, the same being
14 contused, bruised and scraped in various portions thereof between the thigh and ankle; that he also was bruised and injured in different places upon his back and on his shoulder blades and between said shoulder blades and across the hips; that the third and fourth fingers of his right hand were lacerated and bruised and his right fore-arm was lacerated and bruised, so much so that it was necessary for the physician to cut away portions thereof; that while he was in the wreck the cars of said train caught fire and before he could be released from the car in which he was imprisoned the fire was burning close about him and by reason thereof and the heat connected therewith, he suffered a great shock to his nervous system, intense agony of body and anguish of mind; that as the proximate result thereof he has ever since said time suffered great pain in his head, and back, and arms, and legs, and spinal cord, and the nerves proceeding therefrom have become permanently deceased, and his entire nervous system and strength thereof has been greatly impaired, and he has become permanently diseased in his spine and back and the nerves thereof, and he has been unable to perform his ordinary duties as Postal Clerk and his capacity to earn a livelihood has been greatly and permanently impaired and his condition will continue to grow worse as long as he may live.

Plaintiff further says that the defendant maintains on its right of way two main tracks, one a north bound and one a south bound track over which its passenger trains run in going between said points of Youngstow- and Pittsburg; that immediately south of the place of the accident there was, at the time of said accident, a cross-over track whereby trains were enabled to pass from the north bound to the south bound track, and that at said point on the north side of said north bound track, a switch stand was maintained by the defendant about five or six feet high; that at the place and time of the accident, a switch led from the north bound track permitting trains, when said switch was open, to pass onto a side track; that at said switch there was also maintained by the defendant, on the north side of said north bound track, a switch stand between five and six feet high; that at the time of the accident said switch stands were so situated as to be equally distant from said north bound track;
15 that on the top of each the defendant then maintained fans crossing each other at right angles, which fans were originally

painted red and white and were so arranged on said switch stand that when the switches heretofore referred to were closed the white fan would be at right angles with the north bound track, and when the switches were open the red fan would be at right angles with said north bound track.

Plaintiff further says that the defendant and its agents and employés in that behalf, (the names of which agents and employés he is unable to discover) unlawfully, negligently and carelessly permitted the color of said fans to become dim and obscure so that it was difficult for locomotive engineers approaching the same to determine whether the red or the white fan was at right angles to the north bound track. Plaintiff says that the defendant and its agents and employés in that behalf, unlawfully, negligently and carelessly placed and maintained said switch stands in the position hereinbefore described, so that to a locomotive engineer approaching them on the north bound track they were directly in line one with the other, and as a result thereof a view of the fan on the one furthest north, to-wit, the one situated at the side track switch, was obstructed by said fan on the switch stand south thereof, to-wit, at the cross-over track, to one so approaching them as aforesaid.

Plaintiff further says that the defendant unlawfully, carelessly and negligently failed and neglected to place and maintain at said northerly switch an electrical automatic semaphore signal or other proper and efficient appliance which would notify the engineer in charge of the locomotive as to whether the said switch at said point was open or closed, and unlawfully, carelessly and negligently maintained a switch stand of the height of the one maintained by said defendant at the time and the place of the accident, said switch stand being too low for the purpose for which it was used.

Plaintiff says that for a long time previous to said 24th of June, 1901, the employés of the defendant operating the work trains of defendant, were in the habit of using said switches without closing the same when they were not in actual use thereof, and the de-
16 fendant unlawfully, negligently and carelessly permitted those of its employés going through said switch and passing with their train onto said side track, while performing work thereon, to allow said switch to remain open.

All of which unlawful, careless and negligent acts and omissions as aforesaid, were known to the defendant and its agents and employés in that behalf, and could, in the exercise of reasonable care, have been so known, and none of which was known to the plaintiff, nor could the same have been known to him by the exercise of reasonable care on his part. The names of the employés and agents of the company having knowledge thereof, the plaintiff is unable to ascertain at this time.

Plaintiff says that whilst said train was thus proceeding on said north bound track drawn by an engine with one James Brown as its engineer, it ran into the said side track as aforesaid, the switch of which was open, and all the cars thereof, including the mail car in which the plaintiff was performing his duties as aforesaid, were thereby derailed and wrecked; and plaintiff says that said engineer,

though in the exercise of ordinary care in that behalf, was not able to see, and did not see that said switch was open, in time to stop his train and avert said wreck, by reason of the negligent and careless acts of the defendant as aforesaid, and plaintiff was then and thereby injured as aforesaid. And plaintiff says that he, at all times, was in the exercise of proper care on his part, and that the proximate cause of his aforesaid injuries was the unlawful, careless and negligent acts of the defendant as aforesaid.

Plaintiff further says that at the time of said injuries by him so received, he was of the age of 30 years, of sound, healthy and robust constitution; that he was able to and did earn the sum of nine hundred dollars per year; that by reason of the premises he has sustained damages in the sum of $25,000.00.

Wherefore, He prays judgment against the defendant for said sum of $25,000.00, and his costs.

W. S. ANDERSON AND
MURRAY & KOONCE,
Attorneys for Plaintiff.

17 In the Court of Common Pleas, Mahoning County, Ohio.

REUBEN L. MARTIN, Plaintiff,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant.

Answer.

Now comes the defendant, the Pittsburg & Lake Erie Railroad Company, and for answer to the plaintiff's petition filed herein, says, it admits the incorporation of said defendant company under the laws of the States of Pennsylvania and Ohio, having the principal offices at Pittsburg, Pa., and its operation of a line of railroad extending from the City of Pittsburg, Pa., to the City of Youngstown, O., as a common carrier of freight and passengers, in accordance with law. It admits that on June 24th, 1901, and prior thereto, this plaintiff was in the employ of the Postal Department of the United States as a railroad postal clerk or route agent, and further admits that as such postal clerk or route agent he was engaged in the discharge of his duties under said contract with the United States Government, on and about a mail car of the Pittsburg & Lake Erie Railroad Company, transported over this defendant's road and premises from Pittsburg, Pa., to Youngstown, Ohio, and return.

It further admits that for a long time previous thereto, there existed a contract and arrangement between the Postal Department of the United States Government and the Pittsburg & Lake Erie Railroad Company by the terms of which the said defendant agreed and contracted to carry the United States mail over its said railroad between Pittsburg, Pa., and Youngstown, Ohio, in both directions in a mail car especially furnished by the defendant company for that purpose, and also to transport and carry such duly authorized rail-

road postal clerks or route agents in said car and over said road, as might be placed in charge of the mail so carried by the Postal Department of the United States. And it further admits that for the
18 carrying of said mail and the transportation of it over its road, this defendant was to receive and did receive a fixed compensation agreed upon between the United States Postal Department, and the Pittsburg & Lake Erie Railroad Company.

It further avers, if that fact be material, that said contract was entered into at the City of Washington, D. C.

The defendant further answering admits that on the 24th day of June, 1901, while the plaintiff was so employed by the United States Government to work upon one of the defendant's railway mail trains, and while in the discharge of his duties upon a mail car in said train, running from Pittsburg, Pa., toward Youngstown, at a point near the station of Monaca in the State of Pennsylvania, on defendant's railroad, the said train and the car in which the plaintiff was so employed, was derailed at an open switch leading from the main track of said defendant's road, and that the car in which the plaintiff was riding was overturned, and that the plaintiff was thereby injured.

The defendant further admits that said car was derailed by reason of said open switch, leading from the main track of said defendant's road at said point, near the station of Monaca, Pa., which switch had been left open by the negligence of one or more of the crew of a work train, subordinate servants under the control and in the employment of this defendant company. And further admits that at the time of the entering into of said contract by said plaintiff with the United States Postal Department, and at the time of his employment by the United States Government and a long time prior thereto, and at the time of the injury of this plaintiff, that it was and still is the statutory law of the State of Pennsylvania, as provided by the act of the General Assembly of said State, passed April 4th, 1868, that

"When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which said person is not an employé, the right of action in all such cases against the railroad company,
19 shall be only such as would exist if such person were an employé, provided this section shall not apply to passengers."

And the defendant further says, that construing the statutory law of the State of Pennsylvania, it has been held and determined by the Supreme Court of said State, in the case of the Railroad Company *vs.* Price, 96 Pennsylvania State, page 256, which decision was subsequently affirmed in the Supreme Court of the United States, 113 U. S. page 218, that a mail agent or postal clerk in the employ of the United States Postoffice Department, and traveling on a railroad in pursuance of his duties, is not a passenger within the meaning of said act; and the defendant further says, that the plaintiff under and by virtue of the provisions of said act, and of said decision so rightfully working upon the cars and premises of the railroad company, with the state of Pennsylvania, at the time of his said accident, has the same rights and such only as he would have had if he had been em;

ployed by the defendant railroad company at the time of receiving said injury of June 24th, 1901.

And further answering, this defendant says, that it was at all of the time hereinbefore mentioned, and still is the law of the State of Pennsylvania under said decision, and other decisions of the Supreme Court of the State of Pennsylvania, that a postal clerk in the employ of the United States Government is and then was a fellow servant and co-servant with all other train crews, engaged in running and operating the same and other trains of said defendant company, including the trainmen and all the crew of the work train, through whose negligence said switch was left open, resulting in the injury to this plaintiff, and that for the neglect of any one or more of said trainmen, resulting in injury to the said postal clerk in said state, there can be no recovery against the railroad company, and the plaintiff is amenable in his rights and remedies to said law, wherever his remedies may be prosecuted.

Wherefore, The defendant says, that each and every one of the employés of this defendant company, through whose neglect
20 the said switch was left open in front of said approaching train, were fellow servants and co-servants of the said plaintiff, by virtue of the law already pleaded, and for their neglect or the neglect of any one of them, the said defendant is not liable.

The said defendant further answering, denies the nature and the extent of the plaintiff's injuries as pleaded, and denies each and every other allegation in said plaintiff's petition, not herein specifically admitted. It denies that the said defendant company was guilty of any negligence whatever, and avers that it is in no manner liable to said plaintiff, and prays that it may be allowed to go hence with its costs.

By J. P. WILSON,
Attorney for P. & L. E. R. R. Co.

THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN, Plaintiff,
vs.
THE PITTSBURG AND LAKE ERIE RAILROAD COMPANY, Defendant.

Amended Reply.

Now comes Reuben L. Martin, plaintiff, and leave of court first having been obtained to file this, his amended reply herein says, that he admits that the train on which he was injured at the time of receiving the injuries complained of by him in his petition herein, was derailed by reason of an open switch leading from the main track of defendant's road at the point of the derailment and which switch had been left open by the negligence of one or more of the crew of a work train, subordinate servants under the control and in the employment of said defendant company.

Plaintiff denies that said employés of said defendant company, through whose negligence said switch was left open at the time of the derailment of the train which caused his injuries, or that any
21 of said employés were his fellow-servants or co-servants. And denies that for their neglect, or the neglect of any of them, the defendant is not liable to him for the injuries complained of herein.

And plaintiff further denies that it was at the times referred to by defendant in its said answer and still is the statutory law of the State of Pennsylvania as provided by the Act of the General Assembly of the State of Pennsylvania,

"When any person shall sustain personal injuries or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which said person is not an employé, the right of action in all such cases against the railroad company shall be only such as would exist if such person were an employé, provided this section shall not apply to passengers.

Plaintiff says that if it should appear that it was at the times hereinbefore referred to and now is the statutory law of the State of Pennsylvania as hereinbefore referred to and quoted, and that said statute has been determined by the Supreme Court of the State of Pennsylvania to provide that a mail agent or postal clerk in the employ of the United States Postoffice Department and traveling on a railroad in pursuance of his duties, is not a passenger within the meaning of said act, that said act and the decisions of the Supreme Court of Pennsylvania construing the same, if any have been made, or either of them, have no application whatever to the rights of the plaintiff and those sought by him to be enforced in this action.

Plaintiff further says that if it should be made to appear that such statutory provision and decisions of the Supreme Court of Pennsylvania, as referred to by defendant in its answer herein, exists, that said statutory provision is invalid and void for the reason that it is in conflict with that portion of the 8th Section of Article 1, of the Constitution of the United States, wherein and whereby it is provided that Congress shall have power to regulate commerce with
22 foreign nations and among the several states; and it is also invalid and void for the reason that it is in conflict with that portion of said section of said constitution, whereby it is provided that Congress shall have power to establish Post Offices and Post Roads.

Plaintiff further says that if it should be made to appear that such statutory provision and decisions of the Supreme Court of Pennsylvania, as referred to by defendant in its answer herein, exists, that said statutory provision is invalid and void for the reason that it is in conflict with that portion of the first section of Article 14, of the Amendments to said Constitution whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Plaintiff further replying says that he denies each and every allegation, statement and averment contained in said defendant's answer which does not admit the allegations contained in his petition, or which are not specifically herein admitted, or which are in any manner inconsistent with the allegations contained in his petition.

Wherefore plaintiff prays judgment as by him prayed for in his petition herein.

W. S. ANDERSON AND
MURRAY & KOONCE,
Attorneys for Plaintiff.

THE STATE OF OHIO, *Mahoning County, ss:*

Court of Common Pleas, May Term, 1904.

REUBEN L. MARTIN
vs.
P. & L. E. R. R. Co.

We, the Jury in the above entitled cause, find the issues joined by the pleadings for the Defendant.

A. W. KENNEDY, *Foreman.*

23 THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN, Plaintiff,
vs.
THE PITTSBURG AND LAKE ERIE RAILROAD COMPANY, Defendant.

Motion for New Trial.

Now comes the plaintiff and moves the court to set aside the verdict rendered in this case and grant a new trial for the following causes affecting materially the substantial rights of the plaintiff:

First. That the Court erred in the trial of said cause in the admission of evidence offered by the defendant over the objection of the plaintiff to which ruling of the Court the plaintiff at the time excepted.

Second. That the Court erred in its charge to the jury.

Third. That the Court erred in refusing to charge the jury as requested by the plaintiff.

Fourth. That the verdict is contrary to the law and the evidence.

Fifth. That each and every offer of the evidence and law relied on by defendant to establish its defense to plaintiff's cause of action, and which was introduced by defendant at the trial of this cause, and admitted by the court over the objection and exception of the plain-

tiff, was immaterial and incompetent, and insufficient for the purpose of establishing a defense to plaintiff's said cause of action for each of the following reasons:

1. Because said statutory provision on which said defense is based is invalid and void for the reason that it is conflict with that portion of the 8th section of Article 1 of the Constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

24 2. Because said statutory provision is invalid and void for the reason that it is in conflict with that portion of said section of said Constitution whereby it is provided that Congress shall have power to establish postoffices and post roads. And,

3. Because said statutory provision is invalid and void for the reason that it is in conflict with that portion of the 1st Section of Article 14 of the Amendment to the United States Constitution whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sixth. For other errors apparent upon the face of the record.

W. S. ANDERSON AND
MURRAY & KOONCE,
Attorneys for Plaintiff.

THE STATE OF OHIO, *Mahoning County, ss:*

Court of Common Pleas.

REUBEN L. MARTIN
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY.

Certificate of Transcript.

I, J. Howard Edwards, Clerk of the Court of Common Pleas, within and for said County and State, having in my official care and custody the records and files of said Court do hereby certify

25 that the foregoing is a full and correct transcript of all the docket and journal entries in the above entitled case; that the pleadings and papers hereto attached are the original pleadings and papers filed in this case.

Witness my signature as such Clerk and the Seal of said Court at Youngstown, this 19th day of July, 1904.

[SEAL.] J. HOWARD EDWARDS, *Clerk.*

THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN, Plaintiff,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that at the trial of the above entitled cause before the Honorable George F. Robinson, Presiding Judge, and a jury, at the May Term, A. D., 1904, of the Court of Common Pleas in and for the County of Mahoning and State of Ohio, the plaintiff to maintain the issues on his part to be maintained offers in evidence the stipulation, admission of facts, hereto attached, marked "Exhibit A," and made a part of this Bill of Exceptions, which is as follows:

26 EXHIBIT "A."

THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN, Plaintiff,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant.

Stipulation.

For the purpose of the trial of this cause at the May Term of this Court, A. D., 1904, the following facts are agreed to and admitted by the mutual consent of both parties to this case, and no proof need be introduced by either party to establish the same.

First. That Reuben L. Martin, at the time of the accident complained of in his petition was, and for some time prior thereto had been, in the employ of the United States Government, as a railway postal clerk, charged with the duty of distributing the United States Mail in a mail car running both ways on continuous passage, between Cleveland, Ohio, and Pittsburg, Pennsylvania, over the lines of the Erie Railroad Company and the Pittsburg & Lake Erie Railroad Company; which car formed a part of passenger and mail train No. 23, of the Pittsburg & Lake Erie Railroad Company, carrying in said car only United States Mail and those employés of the United States Government entrusted by said Government with the distribution of said mail in said car; and which car was a part of the regular mail and passenger train of the Pittsburg & Lake Erie Company.

Second. That the mail with which the plaintiff was entrusted, was being carried by the Pittsburg & Lake Erie Railroad Company, by virtue of a contract between said company and the United States

Government, made at the City of Washington, D. C., by which for a stated compensation by said United States Government to said Pittsburg & Lake Erie Railroad Company paid, the Pittsburg &
27 Lake Erie Railroad Company contracted to carry the United States mail, and also such government employés as should be entrusted by the Government with the care and distribution of the mail, including the plaintiff, and to provide a car for that purpose.

Third. That the plaintiff at the time of his appointment as a railway postal clerk and at the time of his injury, was a citizen and resident of New Lisbon, Ohio. That his contract of service as such railway postal clerk was made with the United States Government on the 31st day of December, 1895, from which day he continued to serve as such railway postal clerk up to the time of his injury herein complained of, earning the sum of $900.00 per year.

That during the time that plaintiff was running between the two points of Cleveland and Pittsburg aforesaid, at and prior to the time of the accident wherein he received his injuries, he reported for duty at Cleveland, Ohio, to the mail transfer clerk stationed at Cleveland and would and did run for six days between Cleveland and Pittsburg, and at the end of the sixth day would terminate his trips at Cleveland after reporting to said mail transfer clerk, hereinbefore referred to, and would then have a period of four days for recreation and study during which time he did not run on any mail route and at the expiration of which four days he would and did again report for duty at Cleveland as hereinbefore described, and that his duties were performed by him six days on duty and four days off duty and his periods of duty commenced at said City of Cleveland, Ohio, and ended there in the manner heeinbefore referred to.

Fourth. That at the time of the accident, said plaintiff was in the railway postal car furnished by the Pittsburg & Lake Erie Railroad Company for the transmission of mail and railway postal clerks, employed in and about the care, custody and distribution of the mail being carried therein, under and in execution of said contract, and that he received his injuries in an accident which occurred near Monaca within the State of Pennsylvania, by reason of the negligence of one or more of the crew of a work train, subordinate
28 servants under the control and in the employment of the Pittsburg & Lake Erie Railroad Company, in permitting a switch leading from the main track into a side track to be open, whereby the train on which plaintiff was performing his duties was derailed and wrecked. That plaintiff was in the exercise of due care on his part.

Fifth. That the plaintiff, Reuben L. Martin, was not accountable while so employed in said car as railway postal clerk, in any way to The Pittsburg & Lake Erie Railroad Company or its employés, nor had they (said Pittsburg & Lake Erie Railroad Company and its employés) any connection with, or control over him, in the performance of his duties on the train, and that he had nothing to do with the work of running the train nor had he anything to do with The Pittsburg & Lake Erie Railroad Company or its employes in running the train.

Sixth. That the plaintiff received the injuries complained of by him in his petition in this action filed.

W. S. ANDERSON AND
MURRAY & KOONCE,
Attorneys for Plaintiff.
JAMES P. WILSON,
Attorney for Defendant.

The plaintiff here rests his case.

The defendant to maintain the issues on its part to be maintained and to rebut the evidence of plaintiff, offers in evidence Section 1 of the Act of April 4, 1868, found on page 58 of the Session Laws of Pennsylvania of 1868, which Section reads as follows:

SECTION FIRST: "Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, it is hereby enacted by the authority of the same that when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and
29 premises of a railroad company, or in or about any train or car, therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé, provided that this section shall not apply to passengers."

To the admission of this offer of evidence the plaintiff objects for each of the following reasons:

First. Because said statutory provision is invalid and void for the reason that it is in conflict with that portion of the 8th section of Article 1 of the Constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

Second. Because said statutory provision is invalid and void for the reason that it is in conflict with that portion of said section of said Constitution whereby it is provided that Congress shall have to establish postoffices and post roads. And,

Third. Because said statutory provision is invalid and void for the reason that it is in conflict with that portion of the first Section of Article 14 of the Amendment to the United States Constitution whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person, of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Which objection is overruled and to which ruling of the Court plaintiff excepts.

The defendant offers next in evidence the case of Pennsylvania Railroad Company *vs.* Price, reported in the 96th Volume of Pennsylvania State Reports at page 256, to which plaintiff objects for the same reasons relied on, and referred to, in his objection and exception to the introduction of the Section of the Session Laws of Pennsyl-

vania of April 4, 1868, by the defendant offered, and by the
30 Court admitted, in evidence, herein, by which case said section is given judicial construction. Which objection is overruled by the Court; to which ruling of the Court plaintiff excepts.

Which case of the Pennsylvania Railroad Company *vs.* Price reads as follows:

[Note:—Case omitted from printed record by stipulation of parties.]

Defendant offers in evidence the 113th Volume of the United States Supreme Court reports, page 218, case of Price *vs.* Pennsylvania Railroad Company, to the admission of which plaintiff objects for the same reasons relied on and referred to in his objection and exception to the introduction of the Session Laws of Pennsylvania of April 4, 1868, by the defendant offered, and by the Court admitted in evidence, herein.

Which objection is overruled by the Court; to which ruling of the Court the plaintiff excepts.

Which case of Price *vs.* Pennsylvania Railroad Company reads as follows:

[Note:—Case omitted from printed record by stipulation of parties.]

Defendant offers in evidence case of New York, Lake Erie & Western Railway Company *vs.* Bell, reported in the 112th Volume of Pennsylvania reports, at page 400. To which offer plaintiff objects for the reason that said case is incompentent and irrelevant as evidence, to the issues made in this case, which objection is overruled by the Court, to which ruling of the Court plaintiff excepts.

Which case of New York, Lake Erie & Western Railway Company *vs.* Bell, reads as follows:

[Note:—Case omitted from printed record by stipulation of parties.]

Defendant offers in evidence the case of Patrick Kinney *vs.* Austin Corbin, *et al.*, reported in 132nd Volume of Pensylvania State Reports at page 341, to which offer plaintiff objects for the reason that the same is incompetent and immaterial, which objection is
31 overruled by the Court, to which ruling of the Court the plaintiff excepts.

Which case of Patrick Kinney *vs.* Austin Corbin, reads as follows:

[Note:—Case omitted from printed record by stipulation of parties.]

(It is agreed by the parties that the argument of counsel in the case of Railway Company *vs.* Bell, 112 Pa. St. 400, and in the case of Patrick Kinney *vs.* Austin Corbin, *et al.*, 132 Pa. St. 341, shall not be included in the part of said cases introduced in evidence, and shall not be copied into record.

It is conceded that each of the books offered in evidence containing the cases of Pennsylvania Railroad Company *vs.* Price, 96 Pa. St. 258; New York, Lake Erie & Western Railway Company *vs.* Bell, 112 Pa. St. 400; and Kinney *vs.* Corbin, *et al.*, 132 Pa. St. 341, are the books of Pennsylvania State Reports which they purport to be containing the reports of the decisions of the Supreme Court of

Pennsylvania in said cases. The objection made to said decisions by the plaintiff is not directed to the point as to whether the book is authentic or not.)

Defendant here rests its case.

There being no other or further evidence to be introduced by either party, the plaintiff asks the court to charge the jury the following separate propositions:

32 THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN, Plaintiff,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant.

Request to Charge.

The plaintiff requests the Court to charge the jury the following proposition of law as applicable to the facts in this case:

You are instructed that under the facts admitted by both the plaintiff and the defendant in this action, the plaintiff at the time of his injury, had the rights of a passenger so far as the right of the plaintiff to recover for the negligence of the work train crew, or any one of them, who permitted the switch to remain open leading into the siding, which caused the derailment of the train on which the plaintiff was performing his duties at the time he received his injuries; and that the Act of April 4th, 1868 of the General Assembly of Pennsylvania, known as "An act relating to railroad companies and common carriers, defining their liabilities," and the construction thereon put by the Supreme Court of the State of Pennsylvania, does not avail the defendant as a defense in this action for the reason that said act, so far as the rights of the plaintiff herein are concerned, is invalid, and void for the reason that it is in conflict with that portion of the 8th Section of Article 1 of the Constitution of the United States, wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

33 THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN, Plaintiff,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant.

Request to Charge.

The plaintiff requests the Court to charge the jury the following proposition of law as applicable to the facts in this case:

You are instructed that under the facts admitted by both the plaintiff and the defendant in this action, the plaintiff at the time of his injury, had the rights of a passenger so far as the right of the plaintiff to recover for the negligence of the work train crew, or any one of them, who permitted the switch to remain open leading into the siding, which caused the derailment of the train on which the plaintiff was performing his duties at the time he received his injuries; and that the Act of April 4th, 1868, of the General Assembly of Pennsylvania, known as "An act relating to railroad companies and common carriers, defining their liabilities", and the construction thereon put by the Supreme Court of the State of Pennsylvania, does not avail the defendant as a defense in this action for the reason that said act, so far as the rights of the plaintiff herein are concerned, is invalid, and void for the reason that it is in conflict with that portion of the 8th Section of Article 1 of the Constitution of the United States, wherein and whereby it is provided that Congress shall have power to establish postoffices and post roads.

34 THE STATE OF OHIO, *Mahoning County, ss:*

In the Court of Common Pleas.

REUBEN L. MARTIN, Plaintiff,

vs.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant.

Request to Charge.

The plaintiff requests the Court to charge the jury the following proposition of law as applicable to the facts in this case:

You are instructed that under the facts admitted by both the plaintiff and the defendant in this action, the plaintiff at the time of his injury had the rights of a passenger so far as the right of the plaintiff to receover for the negligence of the work train crew, or any one of them, who permitted the switch to remain open leading into the siding, which caused the derailment of the train on which the plaintiff was performing his duties at the time he received his injuries; and that the act of April 4th, 1868, of the General Assembly of Pennsylvania, known as "An act relating to railroad companies and common carriers, defining their liabilities" and the construction thereon put by the Supreme Court of the State of Pennsylvania, does not avail the defendant as a defense in this action for the reason that said act, so far as the rights of the plaintiff herein are concerned, is invalid, ar d void for the reason that it is in conflict with that portion of the First Section of Article 14, of the amendments to the Constitution of the United States, whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Court refuses to charge the first request tendered by the plaintiff hereinbefore set out, to which refusal of the Court so to charge, the plaintiff excepts.

35 The Court refuses to charge the second request tendered by the plaintiff hereinbefore set out, to which refusal of the Court to charge, plaintiff excepts.

The Court refuses to charge the third request tendered by the plaintiff hereinbefore set out, to which refusal of the Court to charge, plaintiff excepts.

Whereupon the arguments of Counsel to the Court and Jury were proceeded with, at the conclusion of which the Court charged the Jury on the issues joined as follows:

GENTLEMEN OF THE JURY:

Under the evidence and law governing this case it is the duty of the Court to direct you to return a verdict for the defendant which you are hereby instructed to do.

Plaintiff excepts to the charge of the Court as given.

The above stenographer's report contains and comprises all the evidence offered by either party in the trial of the case, the requests to charge, and exception thereto, together with all the exceptions to the introduction of exclusion of evidence taken at the trial and at the time the evidence was being introduced as shown by said report, and in the order herein given, as shown by the stenographic notes taken on the trial of which the foregoing is a true and correct transcript, and the jury having found in favor of the defendant, as instructed, the plaintiff within three days made and filed his motion for a new trial, but the Court overruled said motion for a new trial and rendered judgment on the verdict and said plaintiff excepted to said ruling of said court in overruling said motion for a new trial and rendering judgment on the verdict, and also to the ruling of the Court upon objections to the evidence, which were made during the trial as shown by the above report of the evidence, and to the refusal of the Court to give each of the written requests of the plaintiff, as shown by said report above referred to, and to the charge of the Court as given, and prays this, his Bill of Exceptions, may be allowed.

36 And forty days from the overruling of said motion for a new trial and rendering judgment on the verdict, having been given the plaintiff in which to prepare, have allowed, signed and sealed this Bill of Exceptions, and have the same entered upon the journal of this Court.

Now within forty days from the overruling of said motion for a new trial, to-wit, on the first day of July, 1904, the above Bill of Exceptions is placed in the hands of the Clerk.

And now, immediately on the filing of said Bill of Exceptions, (the consent of the adverse party to such transmission being indorsed thereon) to-wit, on the first day of July, A. D. 1904, the Clerk of the Court transmitted said Bill of Exceptions, no objections or amendments having been filed thereto, to the Trial Judge, and the same was

thereupon immediately signed and returned to the Clerk of Courts on said first day of July, A. D. 1904, by said Trial Judge.

Whereupon the above Bill of Exceptions is allowed by the Court, signed and sealed, and upon motion of the plaintiff ordered to be made a part of the record in this case.

This first day of July, A. D. 1904.

GEO. F. ROBINSON,
Trial Judge and Judge of Said Court of Common Pleas.

The consent of The Pittsburg & Lake Erie Railroad Company is hereby given that the Clerk may immediately on the filing of this Bill of Exceptions transmit such Bill of Exceptions to the Trial Judge.

July 1st, 1904.

THE PITTSBURG & LAKE ERIE R. R. CO.,
By J. P. WILSON, *Its Attorney.*

37 THE STATE OF OHIO, *Mahoning County, ss:*

Court of Common Pleas.

REUBEN L. MARTIN
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY.

Certificate to Transcript.

I, J. Howard Edwards, Clerk of the Court of Common Pleas, within and for said County and State, having in my official care and custody the records and files of said Court, do hereby certify that the Bill of Exceptions hereto attached, marked, filed July 1, 1904, and July 1, 1904, is the original one allowed and signed by the Court and ordered to be made part of the record in this case.

Witness my signature as such Clerk and the Seal of said Court at Youngstown, this 1st day of July, 1904.

[SEAL.] J. HOWARD EDWARDS, *Clerk.*

38 In the Supreme Court of Ohio, January Term, A. D. 1905.

THE STATE OF OHIO, *City of Columbus, ss:*

Certified Transcript of Docket and Journal Entries.

In the Record and Proceedings then and there had and held, among other things, is the following, to-wit:

9239.

REUBEN L. MARTIN, Plaintiff in Error,
vs.
THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, Defendant in Error.

Error to the Circuit Court of Mahoning County.

Nov. 19, 1904. Petition in error, Waiver, Circuit Court transcript, Original Papers and Bill of Exceptions filed.
" " " Printed Record and Proof of Service filed.
" " " Plaintiff's Printed Brief and Proof of Service filed.
" " " Stipulation as to Record filed.
" " " Motion by Plaintiff to Advance, Notice and Affidavit filed.

Dec. 6, " Journal Entry.

"Motion by Plaintiff to advance Cause No. 9239 on the General Docket."
"Ordered by the Court that said Motion be, and the same is hereby allowed." Journal No. 20, Page 86.

" 31, " Defendant's Printed Brief filed.
Jan. 3, 1905. Proof of Service filed.
Apr. 19, " Plaintiff's printed Reply Brief and Proof of Service filed.

May 16, " Journal Entry.

"This cause came on to be heard upon the transcript of the record of the Circuit Court of Mahoning County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Circuit Court be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein, It is further ordered that the defendant in error recover its costs from the plaintiff in error herein expended, taxed at $—.

Ordered, That a Special Mandate be sent the Court of Common Pleas of Mahoning County to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the Clerk of the Circuit Court of Mahoning County, "for entry."

J. No. 20, P. 283.

May 23, 1905. Mandate Issued.
" " " Original Papers sent Clerk.

June 6, " Entry of Certification.

"On motion of said plaintiff in error, Reuben L. Martin, this Court in addition to the *to the* orders heretofore made herein, order it to be certified and made part of the record of this case and of
39 the judgment of affirmance heretofore entered herein, that the defense interposed by the defendant to the cause of action of the plaintiff herein is founded upon the Act of the Assembly of the State of Pennsylvania of April 4, 1868, P. L., 58.

It is further certified that said plaintiff in error set up in his amended reply to the answer, filed in the Court of Common Pleas of Mahoning County, Ohio, and in his petition in error in the Circuit Court of Mahoning County, Ohio, and in his petition in error in the Supreme Court of Ohio, asking a reversal of the judgment of the Circuit Court of Mahoning County, Ohio, that said Act of the Assembly of the State of Pennsylvania of March 4, 1868, P. L., 58, and the proceedings of said Court of Common Pleas and Circuit Court of Mahoning County, Ohio, had thereunder, was repugnant to the portion of the Eighth Section of Article One of the Constitution of the United States, wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states and that Congress shall have power to establish postoffices and postroads. Also that said Act and the proceedings had thereunder were claimed and set up by plaintiff in error, in the manner hereinbefore referred to, to be repugnant to that portion of the First Section of Article Fourteen of the Amendments to the Constitution of the United States, whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

That said judgment of affirmance was in favor of the validity of said statute and of said proceedings had thereunder, and that they were not repugnant

to any of the said provisions of said Constitution or of the Amendments thereto. That said plaintiff in error duly excepted to said judgment of affirmance. That it became material to the determination of said case in this Court to determine said question so made by plaintiff in error, which was determined adversely to plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein.

It is further certified that this Court is the highest court of law or equity in the State of Ohio in which a decision can be had in this state."

J. 20, p. 316.

June 9, 1905. Copy of Entry of Certification sent Clerk of Courts.
" " " Entry of Certification filed.
" 17, " Petition for Writ of Error filed.
" " " Assignment of Errors filed.
" " " Bond in Duplicate filed.
" " " Order allowing Writ of Error filed.
" " " Writ of Error filed.
" " " Citation on Writ of Error filed.
" " " Citation issued to Sheriff of Mahoning County.
" " " Sworn Return of Sheriff of Mahoning County on Citation filed.

40 Supreme Court of the State of Ohio.

STATE OF OHIO, *City of Columbus:*

I, Lawson E. Emerson, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing Petition for Writ of Error, Assignment of Errors, Bond, Order Allowing Writ of Error, Writ of Error, Citation on Writ of Error, Citation issued to Sheriff and Return thereon are the original papers filed in this Court in the case of Reuben L. Martin, Plaintiff in Error *vs.* The Pittsburgh & Lake Erie Railroad Company, Defendant in Error; that the printed copy of the record attached hereto is a true and correct copy of the Printed Record filed in said Supreme Court and used in the consideration of said cause, and that the foregoing Transcript of Docket and Journal Entries is truly taken and correctly copied from the records of said Court in said Cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 23rd day of June, A. D., 1905.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk, Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

Endorsed on cover: File No. 19,823. Ohio supreme court. Term No. 321. Reuben L. Martin, plaintiff in error, *vs.* The Pittsburg & Lake Erie Railroad Company. Filed July 1st, 1905. File No. 19,823.

FILED

AUG 3 1906

JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States

No. 66

REUBEN L. MARTIN,

Plaintiff in Error,

vs.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,

Defendant in Error.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR

CHARLES KOONCE, Jr.
Attorney for Plaintiff in Error.

ROBERT B. MURRAY,
WILLIAM S. ANDERSON,
Of Counsel.

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V. ARGUMENT 9

First: Is the act of April 4, 1868, P. L. 58, of the Assembly of Pennsylvania invalid as against the Plaintiff 9

A. Prior to the enactment of said Statute every one lawfully on a train who was not in fact an employe of the company was, and had the rights of, a passenger in the State of Pennsylvania 9

B. The Common Law of Pennsylvania was thus announced by the Supreme Court of the United States 10

C. The same rule has been thus announced without exception in every other jurisdiction 11

1. The rule is based on public policy 16

2. The question for consideration is whether or not—a person not being permitted to be deprived of his rights as a passenger by contract on the ground that such contract is against public policy—he can be deprived thereof by legislative enactment without his consent 17

3. Persons may voluntarily contract to do what no Legislature would have the right to compel them to do 18

D. The right is attempted to be taken away by the Act of Pennsylvania, April 4th, 1868, P. L. 58, and the construction given thereto by the Supreme Court of that State 18

Second: The Act is in violation of the Interstate Commerce Clause of the Federal Constitution 20

A. The authority of Congress to legislate with reference to the establishment of Post Offices and Post Roads and all matters of an executive and administrative character pertaining thereto, is exclusive 20

1. The duties and rights of railway postal clerks, and the regulations prescribing them, having their source exclusively in the Federal Government, are subjects wholly national in their character, and, concerning the rights, duties and liabilities governing the same, there can be but one uniform system of regulation 21

2. The legislative power, therefore, vests only in Congress to regulate the same 21

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B. But even if the right of Congress to legislate with reference to the rights and liabilities of the Plaintiff were not exclusive, said state statute is in conflict with the Interstate Commerce clause of the Federal Constitution, affecting the rights of Plaintiff going from one state to another in the performance of his business..... 24

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A. It deprives the Plaintiff of property without due process of law 29

1. In that it abridges the liberty of contract..... 30

2. In that it deprives him of his right of remedy for negligent injury 33

B. It abridges Plaintiff's privileges and immunities as a citizen of the United States 35

C. It denies to him as a railway postal clerk within the jurisdiction of that state the equal protection of the laws.. 36

1. The classification and discrimination made by the Act are arbitrary as relating to postal clerks.... 40

(a) It takes them out of the class (passengers traveling for compensation), to which they in fact and in law belong; and places them in a class (employes) to which they do not in fact or law belong, for they are not "engaged or employed" in relation to the operation of railroad business, as such. As to the carrier, so far as liability for the negligent acts of itself or its servants are concerned, there is, and should be, but one class of those whom it carries for hire, to-wit: passengers 40

(b) It selects only those postal clerks of the Federal Government who perform their duties on modes of transportation conducted by railroad companies; a discrimination at the same time against the postal clerk and in favor of the railroad company 42

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1. The police power must be exercised subject to the provisions of the Constitution of the United States 44

(a) To justify a State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals 46

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(b) The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law 47

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2. The real purpose of the Statute was, as announced by counsel for the Railroad Company, in the Price case, to relieve the railroad companies of the State of Pennsylvania from the burden of paying damages to those injured or killed by reason of the negligence of employees of said companies, said companies having found the burden too great 38

V. CONCLUSION 66

In the Supreme Court of the United States

REUBEN L. MARTIN,
Plaintiff in Error,

vs.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,
Defendant in Error.

Argument in behalf of Plaintiff in Error.

STATEMENT.

This cause comes into this Court on error and it is sought thereby to reverse the judgment of the Supreme Court of the State of Ohio, whereby the judgment of the Circuit and Common Pleas Courts of Mahoning County in said State were affirmed, and wherein and whereby judgment was rendered in favor of defendant in error and against this plaintiff in error. The facts necessary to an understanding of the case are briefly as follows:

The action was brought by the plaintiff to recover for injuries sustained by him while in the performance of his duties as a railway postal clerk, in the employ of the Federal Government, in a United States Postoffice car, running on the Pittsburg & Lake Erie Railroad.

As appears by the agreed statement of facts (R. pp. 29 et seq.), the plaintiff in error, for some time prior to the time of his accident, had been in the employ of the United States Government as such Railway Postal Clerk, charged with the duty of distributing United States mail in a mail car running on continuous passage, between Cleveland, Ohio, and Pittsburg, Pennsylvania, over the lines of the Erie Railroad Company, and The Pittsburg & Lake Erie Railroad Company; that the car provided for the purpose of carrying said mail and said plaintiff between said points, carried only United States mail and those employes of the United States Government entrusted by

said Government with the distribution of said mail in said car.

That the mail with which the plaintiff was entrusted at the time of his injuries, was carried by The Pittsburg & Lake Erie Railroad Company, by virtue of a contract between said Company and the United States Government, made at the City of Washington, D. C., by which for a stated compensation by said Government to said Pittsburg & Lake Erie Railroad Company paid, The Pittsburg & Lake Erie Railroad Company contracted to carry the United States mail, *and also such Government employes as should be entrusted by the Government with the care and distribution of the mail, including the plaintiff, and to provide a car for that purpose.*

That the plaintiff, at the time of his appointment as a railway postal clerk, and at the time he received his injuries, was a citizen and resident of the State of Ohio; that his contract of service as such railway postal clerk was made with the United States Government in 1895, from which time he continued to serve as such railway postal clerk up to the time of his injuries; that during the time he was running between the two points of Cleveland and Pittsburg, aforesaid, at and prior to the time of the accident wherein he received his injuries, he reported for duty at Cleveland, Ohio, to the mail transfer clerk stationed at Cleveland, and would, and did, run for six days between Cleveland and Pittsburg, and at the end of the sixth day would terminate his trips at Cleveland after reporting to said mail transfer clerk, and would then have a period of four days for recreation and study, during which time he did not run on any mail route and at the expiration of which four days he would, and did, again report for duty at Cleveland, as hereinbefore described, and that his duties were performed by him six days on duty and four days off duty and his periods of duty commenced at said City of Cleveland, Ohio, and ended there in the manner hereinbefore referred to.

That at the time of the accident (June 24, 1901) said plaintiff was in the railway postal car, which formed a part of the regular mail and passenger train known as No. 23 of the Pittsburg & Lake Erie Railroad Company, and which was so furnished by said Railroad Company for the transmission of mail and railway postal clerks, employed in and about the care, custody, and distribution of the mail being carried therein,

under and in execution of said contract between said Government of the United States and said The Pittsburg & Lake Erie Railroad Company; that plaintiff received his injuries in an accident which occurred near Monaca, within the State of Pennsylvania, by reason of the negligence of one or more of the crew of a work train, subordinate servants under the control and in the employ of the Pittsburg & Lake Erie Railroad Company, in permitting a switch leading from the main track into a side track to be open, whereby the train on which plaintiff was performing his duties was derailed and wrecked, while plaintiff was in the exercise of due care on his part.

That plaintiff was not accountable while so employed in said car as railway postal clerk, in any way, to The Pittsburg & Lake Erie Railroad Company or its employes, nor had they, (said The Pittsburg & Lake Erie Railroad Company and its employes) any connection with, or control over him, in the performance of his duties on the train, and that he had nothing to do with the work of running the train, nor had he anything to do with The Pittsburg & Lake Erie Railroad Company or its employes in running the train.

Plaintiff bases his right to recover in this action, among other things, upon the ground that he had the rights of a passenger, as contradistinguished from those of an employe of a railroad company, by virtue of the terms of the contract existing between the Federal Government and the Railroad Company, hereinbefore referred to. To this claim the contention was inter posed, by way of defense, on the part of the railroad company, that the accident, having happened in the State of Pennsylvania, his rights, under said contract, *while travelling in that state*, were not those of a passenger but those of an employe of said railroad company, by virtue of the provisions, and the construction given thereto by the Supreme Court of Pennsylvania, of an enactment of the legislature of said state of Pennsylvania known as the Act of the Assembly of the State of Pennsylvania of April 4, 1868, Pamph. Laws, 58.

To which contention the plaintiff replied that if said law of Pennsylvania be held applicable to him that it is, depriving him thus of his rights of a passenger, as to him, in contravention of the Federal Constitution, and cannot be invoked in this action to defeat his claim to such rights at the time of his in-

jury. The specific provisions of the Federal Constitution on which plaintiff in error relies in challenging the validity of said legislative enactment are set forth at length in the amended reply, requests to charge, the motion for a new trial, petition in error in the Circuit Court of Mahoning County, the petition in error in the Supreme Court of the State of Ohio, and in the assignment of errors in this Court. (R. pp. 25-33-34-27-16-12-5.)

SPECIFICATION OF ERRORS.

The following errors are relied upon by the plaintiff in error in this court.

FIRST. That said judgment of the Court of Common Pleas of Mahoning County, Ohio, and said Circuit Court of said County and State affirming the same, and said judgment of affirmance of the Supreme Court of the State of Ohio, violate in effect, and are repugnant to, that portion of the 8th section of Article 1 of the Constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

SECOND. That said judgment of said Court of Common Pleas of Mahoning County, Ohio, and of the Circuit Court of said County and State affirming the same, and said judgment of affirmance of the Supreme Court of the State of Ohio, violate in effect, and are repugnant to, that portion of the 8th section of Article one of the Constitution of the United States wherein and whereby it is provided that Congress shall have power to establish postoffices and post roads.

THIRD. That said judgment of said Court of Common Pleas of Mahoning County, Ohio, and of the said Circuit Court of said County and state affirming the same, and said judgment and affirmance of the Supreme Court of the State of Ohio violate in effect, and are repugnant to, that portion of the first section of article fourteen of the amendments to the constitution of the United States wherein and whereby it is provided that no state shall make or enforce any law which shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FOURTH. That said Supreme Court of Ohio erred in finding and adjudging that the act of assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, was not in contravention of, and repugnant to, that portion of the 8th section of article one of the constitution of the United States wherein and whereby it is provided that Congress shall have power to regulate commerce with foreign nations and among the several states.

FIFTH. That said Supreme Court of Ohio erred in finding and adjudging that the act of the Assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, was not in contravention of, and repugnant to, that portion of the 8th section of article one of the constitution of the United States wherein and whereby it is provided that congress shall have power to establish postoffices and post roads.

SIXTH. That said Supreme Court of Ohio erred in finding and adjudging that the act of assembly of Pennsylvania of April 4, 1868, P. L. 58, was not in contravention of, and repugnant to, that portion of the first section of article fourteen of the amendments of the constitution of the United States wherein and whereby it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

SEVENTH. That said Supreme Court of Ohio erred in finding and adjudging that the act of assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, was not in contraven-

tion of, and repugnant to, that portion of the first section of Article fourteen of the Amendments to the Constitution of the United States wherein and whereby it is provided that no state shall deprive any person of life, liberty or property without due process of law.

EIGHTH. That said Supreme Court of Ohio erred in finding and adjudging that the act of Assembly of the State of Pennsylvania of April 4, 1868, P. L. 58, was not in contravention of, and repugnant to, that portion of the first section of article fourteen of the Amendments to the constitution of the United States wherein and whereby it is provided that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws.

NINTH. That by the record in this case it appears that the judgment aforesaid given by said Supreme Court of Ohio, affirming the judgment rendered by the Circuit Court and Court of Common Pleas, of the County of Mahoning and State of Ohio, was given for the said Pittsburg & Lake Erie Railroad Company against the said Reuben L. Martin, whereas by the law of the land the said judgment ought to have been given for the said Reuben L. Martin, against the said Pittsburg & Lake Erie Railroad Company.

BRIEF OF ARGUMENT.

I.

The statutory provision interposed as a defense to the cause of action of plaintiff herein, the constitutionality of which is here challenged, is as follows:

> "Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in general assembly met, it is hereby enacted by the authority of the same that when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car, therein or thereon, of which

company such person is not an employe, the right of action and recovery in all such cases, against the company shall be such only as would exist if such person were an employe, provided that this section shall not apply to passengers." (Record p. 31).

II.

Prior to the enactment of said statute a railway postal clerk, as well as all other persons lawfully on a train who were not in the employ of the carrier, had a right to recover for any negligence of the carrier or its employes resulting in injury to the claimant.

(1). It was, prior to the enactment of said statute, and is now, the law of the State of Pennsylvania, that a common carrier could not by contractual stipulation be relieved of liability for the negligence of himself or his servants, whereby those carried by him were injured, for the reason that *public policy* demanded the holding of the carrier to a strict accountability for the negligence of himself and his servants alike.

(2). If this limitation of liability cannot be effected by contract, wherein there is a voluntary waiver, on the part of the one carried, to recover damages against the carrier for negligence of itself or its servants, it cannot be compelled by legislative enactment. Persons may voluntarily contract to do what no legislature would have the right to compel them to do.

(3). The purpose of the statute was to relieve railroad companies of the State of Pennsylvania of a burden of liability for the negligence of its servants, which was considered too great.

III.

Said statutory provision is void for the reason that it is in contravention of the Constitution of the United States in the following respects:

(1). The act is in violation of the interstate commerce clause of the Federal Constitution.

(a) Wherein and whereby it is provided that congress shall have power to regulate commerce with foreign nations and among the several states.

(b) Wherein and whereby it is provided that congress shall have power to establish postoffices and post roads.

(2). The act is in contravention of the Fourteenth Amendment of the Federal Constitution in that

(a) It deprives the plaintiff of property without due process of law.

(b) It abridges his privileges and immunities as a citizen of the United States.

(c) It denies to him as a postal clerk within the jurisdiction of that state the equal protection of the laws.

IV.

The statute cannot be sustained on the claimed ground that it is a police regulation.

(1). The statute is not only in conflict with *public policy* but also lacks any of the essential elements necessary to bring it within the operation of the doctrine of *police regulation.*

(2). To justify a state in interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals.

The statute herein under consideration is unable to withstand said tests.

ARGUMENT.

FIRST.

IS THE ACT OF APRIL 4, 1868, P. L. 58, OF THE ASSEMBLY OF PENNSYLVANIA INVALID AS AGAINST THIS PLAINTIFF?

In order to the more clearly comprehend the operative effect of the provisions of the statute, the constitutionality of which is herein under consideration, it is necessary that we should understand what the relative rights and liabilities of parties, under similar circumstances, are in other states, and were in the State of Pennsylvania before the enactment of said statute. And this is especially true inasmuch as the contention will no doubt be made by defendant in error in this court, as it was in the State courts, that a railway postal clerk would have no rights as a passenger in the State of Pennsylvania, even if the act of April 4, 1868, had never existed; that by the common law of that state such postal clerk had no such rights; and that the different relationship in which he stands to railroad companies carrying him in the State of Pennsylvania from those carrying him in other states is simply a result of a difference in the common law of the State of Pennsylvania from that as it exists in the other states of the Union. To support this contention no authorities were cited by defendant in error in the Courts below.

Inasmuch as each and every one of its contentions by it made rested and depended upon that assumption it is important to have that subject, if possible, settled and free from doubt at the outset of the argument.

A. PRIOR TO THE ENACTMENT OF SAID STATUTE EVERY ONE LAWFULLY ON A TRAIN WHO WAS NOT IN FACT AN EMPLOYE OF THE COMPANY WAS, AND HAD THE RIGHTS OF, A PASSENGER IN THE STATE OF PENNSYLVANIA.

The adjudications of the Court of last resort of the State of Pennsylvania, as announced prior to the enactment of the statute, established beyond controversy what was the rule gov-

erning the rights of those carried by a railroad company in its trains who were not employes of such company.

The language used by the Supreme Court in the following cases permits the existence of not even a doubt as to what such rights were.

> "I cannot doubt but that the deceased, in the case in hand, *as he was not a servant of the railroad company, must be considered in the light of a passenger, in charge of property being conveyed with himself by the railroad company for his employers.*"
> Lockhart vs. Lichtenthaler, 46 Pa. St. 151-159.
>
> "There are two grounds of liability on the part of common carriers, contract and duty, *as in the case of the officer of the postoffice department in Collett vs. London & Northwestern Railway Company, 15 Jur. 1053.*"
>
> Pennsylvania Railroad Co. vs. Henderson, 51 Pa. St. 315-326.
>
> "Where one is travelling by a pasenger train and is not connected with the railroad company, the legal presumption is that he is a passenger and travelling for a consideration."
>
> Creed vs. Railroad Co., 86 Pa. St. 139.
> Railroad Co. vs. Myers, 55 Pa. St. 288.

B. THE COMMON LAW OF PENNSYLVANIA WAS THUS ANNOUNCED BY THE SUPREME COURT OF THE UNITED STATES.

But even if the law had not been thus announced by the Supreme Court of Pennsylvania, it was nevertheless the common law of Pennsylvania—that a railway postal clerk had the rights of a passenger, while riding on a train in the performance of his duties as such. This was established by the judicial decisions of the Supreme Court of the United States declaring what constitutes a passenger in the State of Pennsylvania.

> "One who, being lawfully on the defendant's railroad, was injured by the gross negligence of one of their servants, is entitled to an action for his dam-

> ages, though he was a stockholder in the corporation, was riding by invitation of the president, paid no fare, and not in the usual passenger cars."
> Railroad Co. vs. Derby, 14 How. 468.

The test as announced in the case just referred to, like that of all cases decided by the Supreme Court of Pennsylvania prior to the enactment of the statute of 1868, *was whether or not the person injured was lawfully on the train, and not in the employ of the railroad company, at the time of his injury.*

The Court in the case of *Railroad Company* vs. *Derby*, supra, uses the following language on the subject in the course of its opinion, at page 486:

> "In this view of the case, if plaintiff was *lawfully* on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover."

But it is needless to refer to further cases from the Federal jurisdiction to demonstrate the principle or the relationale of the holdings. This Court has determined the status of a railway postal clerk as that of a passenger in the case of *Railroad Company* vs. *Gleason*, 140 U. S. 435, and that forecloses further discussion as to what his common law right was prior to the enactment of the statute therein complained of. If the postal clerk had brought his action in a Federal Court for injuries sustained by him in Pennsylvania, prior to the enactment of said statute, he would, under the decisions of the Court of that jurisdiction, hereinbefore referred to, have been held to be entitled to the rights of a passenger.

If the person injured was "lawfully on the train" and not in the employ of the carrier, he was a passenger and had, both by the federal and Pennsylvania decisions, the rights of a passenger prior to the enactment of said statute.

C. THE SAME RULE HAS BEEN ANNOUNCED WITHOUT EXCEPTION IN EVERY OTHER JURISDICTION.

To the same effect are the holdings of every Court of last resort of the several states which have been called upon to determine the right of a postal clerk. The only state to the con-

trary is Pennsylvania and its decision is based on the statute which stands out as a solitary exception to all the legislative enactments which have appeared on the statute books of either our federal or state governments. Some of the cases holding a railway postal clerk a passenger, and having the rights as such, are as follows:

Calvin vs. *Southern Pac. Co.*, 136 Fed. Rep. 592.
Southern Pacific Co. vs. *Schuyler*, 135 Fed. Rep. 1015.
Arrowsmith vs. *Railroad Co.*, 57 Fed. Rep. 165.
Collett vs. *London*, etc., R. R. Co., 15 Jur. 1053, s. c. 16 Ad. & El. N. S. 948, s. c. 16 Q. B. 984.
Mellor vs. *Railroad Co.* 105 Mo. 460.
Magoffin vs. *Railroad Co.* 102 Mo. 540.
Seybolt vs. *Railroad Co.* 95 N. Y. 562.
Blair vs. *Railroad Co.* 66 N. Y. 564.
Yeomans vs. *Navigation Co.* 44 Cal. 71.
Hammond vs. *Railroad Co.* 6 S. Ca. 130.
Railroad Co. vs. *State*, 72 Md 36.
Railroad Co. vs. *Klingman*, (Ky.) 35 S. W. 464.
Railroad Co. vs. *Crudup*, 63 Miss. 291.
Railroad Co. vs. *Ketchum*, 133 Ind. 346.
Railroad Co. vs. *Shott*, 92 Va. 34.

In the case of *Arrowsmith* vs. *Railroad Company*, *supra*, the rule of law was thus announced as applying to the federal jurisdiction:

> "A railway mail clerk, travelling upon a railway in the service of the United States, is a passenger for hire in so far as the railroad company's liability for his injury is concerned."

It will be observed that the case of *Collett* vs. *Railroad Company*, *supra*, which is the leading case in England on the question, was referred to by the Supreme Court of Pennsylvania in the case of *Railroad Company* vs. *Henderson*, *supra*, and therein approved, in determining the grounds of liability of a carrier, to one being carried, who was not in its employ.

The language used by the Supreme Court of Indiana in the case of *Railroad Company* vs. *Ketchum*, *supra*, is especially apposite, to this case, in view of some of the contentions made

by defendant in error, and is, therefore, here quoted from at some length.

"It may be pertinent to inquire what relation the appellee bore to the appellant if not that of passenger. Having, as we think, a lawful right upon the train, he certainly is not an intruder or trespasser, and we think he certainly does not occupy the same relation as an employe of the appellant, to whom it would not be liable for an injury resulting from the negligence of a co-employe, and he certainly could not be held to be a co-employe with the employes running and operating the train. He is not employed by the appellant. It has no control over him, nor does he take any part in the business of the railway company. The company is under contract to carry both the mail and the mail agent who has charge of and handles the mail. He is employed and paid by the government. *He is, in our opinion, a passenger, having the same rights in relation to the recovery of damages for injuries sustained on account of the negligence of the railway company as any other passenger.* The fact that he may ride in a postal car make no difference with his right of recovery of damages for an injury sustained by reason of a collision resulting on account of the negligence of a railway company. The postal car, the smoking car, the ladies' car, and the parlor car may all constitute one train, all are upon the train for the purpose of carrying passengers. The railway mail clerk, while on duty, necessarily rides in the postal car, for there his duty calls him. It is there he performs his labor. They are constructed properly for work upon the railway. The mail clerks are as helpless, in so far as avoiding danger, which is the result of the negligence of the railway employes, as are any other passengers. They have no more connection with or control over the movements of trains than has any other passenger. It is suggested on behalf of appellant that the danger is enhanced by riding in the postal car, and that in this case, had the appellee been in the smoking car or other cars pro-

vided for passengers only, he would not have been injured. The suggestion, we think, can have but little force. It very often occurs, no doubt, that if one receiving an injury had been in another car than the one in which he was at the time of a collision he would not have been injured and *vice versa.* * * * *The liability of a railway company to a passenger for damages resulting from negligence of its employes is the same whether he be in one car or another, so he have a lawful right in the car he occupies.*"

That before the enactment of said statute the plaintiff would have had the rights of a passenger, while traveling as a railway postal clerk in the performance of his duties, and would have had the right to recover against the defendant for the injuries sustained by him by reason of the accident complained of in his petition herein, is demonstrated by the foregoing authorities.

It was also the established law of the State of Pennsylvania that a common carrier could not by contractual stipulation relieve himself of liability for the negligence of himself or his servants, whereby those carried by him were injured.

> "In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from the responsibility for his own negligence or misfeasance, or that of his servants and agents."
>
> *Railroad Co.* vs. *Lockwood,* 17 Wall. 357-368.
> Citing *Laing* vs. *Colder,* 8 Pa. St. 479.
> *Camden & Amboy Railroad* vs. *Baldauf,* 16 Pa. St. 67.
> *Goldey* vs. *Pennsylvania R. R. Co.,* 30 Pa. St. 242.
> *Powell* vs. *Pennsylvania R. R. Co.,* 32 Pa. St. 414.
> *Pennsylvania R. R. Co.* vs. *Henderson,* 51 Pa. St. 315.

Farnham vs. *Camden & Amboy R. R. Co.*, 55 Pa. St. 53.
Express Co. vs. *Sands*, 55 Pa. St. 140.
Transportation Co. vs. *Oil Co.*, 63 Pa. St. 14.

"Common carriers may limit their ability by a special contract, or special acceptance of the goods, and thus become subject to the laws of bailment only, *but there can be no limitation of liability where the loss or injury resulted from the negligence of the company or its servants.*"

Grogan vs. *Express Company*, 114 Pa. St. 523-529.
Railroad Co. vs. *McClosky*, 23 Pa. St. 526.
Phoenix Pot Works vs. *P. & L. E. R. R. Co.*, 139 Pa. St. 284.

This is true even though the injured one so seeking to recover for such negligence was in charge of freight, and the evidence of his right to be transported was denominated a "free ticket."

Pennsylvania Railroad Co. vs. *Henderson*, 51 Pa. St. 315.
Railroad Co. vs. *Lockwood*, 17 Wall. 357.

In the case of *Pennsylvania Railroad Co.* vs. *Henderson*, *supra*, a drover's pass stipulated for immunity of the company in case of injury from negligence of its servants, or otherwise. The Court, after a careful review of the Pennsylvania decisions, says:

"This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; *and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence.*"

The last syllabus of said case is as follows:

"6. A drover transporting live-stock in the cars of a railroad company, for which he paid freight, received a ticket to 'pass the bearer in charge of his

stock,' on which was endorsed, 'The person accepting this free ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether by the negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the personal property of the person using this ticket.' *Held*, that the drover was not a gratuitous, but a paying, passenger. *Held*, also, that the endorsement was no excuse for negligence."

The ground on which said rule is bottomed is that of public policy.

"It is equally well settled that such limitation (by special contract) does not relieve the carrier from liability for his own negligence. *The reason for this qualification of the power to limit liability rests in public policy.*"

Pennsylvania R. R. Co. vs. *Reordan*, 119 Pa. St. 577.

To the same effect is the holding of this Court in the case of *Railroad Company* vs. *Lockwood*, hereinbefore referred to.

"It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable and will be deemed as wanting in the element of voluntary assent; and, besides, *that such conditions are in conflict with public policy*. The doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary."

The Kensington, 183 U. S. 263-268.

The text writers and Courts, indeed, of almost every jurisdiction, have always adhered to the same rule, and have, in each instance, based their conclusion, on the fact that *public policy* demanded the holding of the carrier to a strict accountability for the negligence of himself and servants alike.

While this subject will be referred to again in a later portion of this argument, this much thereof is referred to now for the purpose of disclosing what the law of the State of

Pennsylvania was at, and prior to, the enactment of said statute, as to the rights of one, not an employe of the carrier, traveling in charge of his employer's property on a train of said carrier, and as to the inability of such carrier to relieve himself of liability for the negligent acts of himself or his servants, by contractual stipulation on the ground of public policy.

In the case at bar the defendant was a common carrier and received a full pecuniary compensation for carrying the plaintiff, and the plaintiff was a passenger and had the rights as such in his trip between Cleveland and Pittsburg up to the time he crossed the dividing line separating the State of Ohio from the State of Pennsylvania; and, in the absence of the statute, would have been liable in the state of Pennsylvania for the injuries sustained by him by reason of the negligence of the crew of the work train in permitting the switch to remain open which caused the derailing and telescoping of the train on which plaintiff was being carried.

In the light of the law as to the liability of common carriers on the ground of public policy as it was established by the utterances of the Court of last resort of the State, prior to the enactment of the statute, it is pertinent to inquire the reason for the change thereof by the legislature, and to determine whether the reason ascribed for its right of being is sufficient to permit it to deprive, in its operation, this plaintiff, and the large class to which he belongs, of rights which are guaranteed to him by the provisions of that instrument which, up to this time, has been the shield of every American citizen invoking its protection within the boundaries of the United States—the Federal Constitution.

The question for consideration now is whether or not—when it is the common law of a state that a person enjoying the rights of a passenger in the relation sustained by him to the carrier, cannot be deprived, *by contract*, of the right to recover damages for the negligence of the carrier and his servants, producing his injuries, on the ground that such contract is against public policy—a person can be deprived of such rights *by legislative enactment*, without his consent, the same considerations of public policy continuing to obtain in each case.

If this limitation of liability cannot be effected by contract,

wherein there is a voluntary waiver, on the part of the one carried, to recover damages against the carrier for negligence of itself or its servant how can it be compelled by legislative enactment.

> "Persons may voluntarily contract to do what no legislature would have the right to compel them to do."
>
> *Railway Co.* vs. *Smith*, 173 U. S. 684-693.

If the rights of this plaintiff, upon crossing the dividing line between the states of Ohio and Pennsylvania, are changed from that of a passenger to that of an employe of the railroad company, over which he is being transported, that change is effected by virtue of the provisions of the act of the Assembly of the State of Pennsylvania hereinbefore referred to, and which act is known as the Act of April 4, 1868, and will be hereinafter referred to as such.

The first section of said act is the part thereof relied on as a defense and is as follows:

> "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad or in or about any train or car, therein or thereon, of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe; provided this section shall not apply to passengers."

That a postal clerk does not come within the proviso, but has, by the terms of said statute, only such rights to recover against the company, as would exist if he were an employe, has been decided by the Court of last resort of that State in the case of *Railroad Company* vs. *Price*, 96 Pa. St. 256.

The statute under said construction would, therefore, in substance, provide:

> "That when a railway postal clerk shall sustain personal injury or loss of life while engaged or employed on the train of a *railroad company* in the pro-

> tection and distribution of the mails of the United States government being transported therein, the right of action and recovery in such case against the company shall be such as would exist if such railway postal clerk were an employe of said company."

By that construction we are bound and the plaintiff in this case must be held to have lost his rights as passenger upon entering into the State of Pennsylvania, unless the statute itself, making this limitation of his right, is invalid, as being in contravention of those portions of the Federal Constitution hereinbefore referred to.

The first inquiry which is suggested in the consideration of the question is: Why was the statute enacted by the legislature of Pennsylvania? The answer is given by counsel for the railroad company in their brief filed in the case of *Pennsylvania Railroad Company* vs. *Price*, introduced in evidence by the defendant in error in this case, for the purpose of establishing its defense herein, and which is found in Volume 96, Pa. St. at page 262, in the following language:

> "The burden on the roalroad companies of the state to pay when any accident happen and personal injury or death result to any such persons, was too great, and the Act of 1868 was passed to relieve them of it. By it another class is added, and now we find those thus 'employed or engaged' are included in it."

We are brought, therefore, to the consideration of the facts, principles of law, and constitutional provisions which are pertinent to the determination of the question as to the validity of this statute.

It is the contention of the plaintiff in error that the act of the legislature which is relied on by the defendant in error to defeat the rights of plaintiff in error as passenger in this case is void for the reason that it is in contravention of the constitution of the United States in the following respects:

First. The act is in violation of the interstate commerce clause of the Federal Constitution.

Second. It is in contravention of the Fourteenth Amendment of the Federal Constitution.

Of these in their order:

I.

THE ACT IS IN VIOLATION OF THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The act is in violation of Article 1, Section 8, of the Constitution of the United States which provides, *inter alia*, as follows:

> "Congress shall have power * * * Third, to regulate commerce with foreign nations and *among* the several states; * * * Seventh, To establish post offices and post roads."

FIRST. THE AUTHORITY OF CONGRESS TO LEGISLATE WITH REFFRENCE TO THE ESTABLISHMENT OF POST OFFICES AND POST ROADS AND ALL MATTERS OF AN EXECUTIVE AND ADMINISTRATIVE CHARACTER PERTAINING THERETO, IS EXCLUSIVE.

> "Wherever 'commerce among the states' goes, the power of the nation, as represented in this Court (United States Supreme Court) goes with it, to protect and enforce its rights."
>
> *In re Debbs*, 158 U. S. 564-583.
>
> *Gilman* vs. *Philadelphia*, 3 Wal. 713-725.

The United States have a property in the mails.

> *In re Debbs*, 158 U. S. 593.
>
> *Searlight* vs. *Stokes*, 3 How. 151.

> "The uniform course of decision has been to declare that it is not within the competency of a state to legislate in such manner as to obstruct inter-state commerce."
>
> *In re Debbs*, 158 U. S. 564-581.

> "The power possessed by congress embraces the regulation of the *entire* postal system of the country."
>
> *Ex Parte Jackson*, 96 U. S. 727-732.

That being true, any legislation on the part of a state legislative body is an infringement upon the right of congress, as one of its reserved powers, to control said system.

The transmission of the United States mails, and those having charge thereof, from one point to another are, therefore, not only subjects of inter-state commerce, but the duties of the latter, as railway postal clerks, and the rules and regulations prescribing them, having their source exclusively in the federal government, and being, as such, liable to federal authority only, they are constituted by such conditions *subjects wholly national in their character* and, concerning the rights, duties and liabilities governing the same, *there can, necessarily, be but one uniform system or plan of regulation.*

When this is true, the rulings of the Supreme Court of the United States have been uniform that the legislative authority vests only in congress to regulate such subjects and an attempt on the part of a state legislative body so to do is beyond its power, and invalid.

> "The constitution of the United States having given to congress the power to regulate commerce, not only with foreign nations, but among the several states, *that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation.*"
>
> *Robbins* vs. *Shelby Taxing District,* 120 U. S. 489-492; Citing: *Cooley* vs. *Wardens,* 12 How. 299-319; *Brown* vs. *Maryland,* 12 Wheat. 419; *The Passenger Cases,* 7 How. 283; *Crandall* vs. *Nevada,* 6 Wall. 35-42; *Ward* vs. *Maryland,* 12 Wall. 418-430; *State Freight Tax Cases,* 15 Wall. 232-279; *Railroad Co.* vs. *Husen,* 95 U. S. 465-469; *Mobile* vs. *Kimball,* 102 U. S. 691-697; *Ferry Co.* vs. *Philadelphia,* 114 U. S. 196-203; *Railroad Co.* vs. *Illinois,* 118 U. S. 557.

> "Another established doctrine of the Supreme Court of the United States is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any re-

strictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom."

Robbins vs. *Shelby Taxing District*, 120 U. S. 489-493; Citing: *Gibbins* vs. *Ogden*, 9 Wheat. 1-222; *Passenger Cases*, 7 How. 283-462; *State Freight Cases*, 15 Wall. 232-279; *Railroad Co.* vs. *Husen*, 95 U. S. 465-469; *Welton* vs. *Missouri*, 91 U. S. 275-282; *Mobile* vs. *Kimball*, 102 U. S. 691-697; *Brown* vs. *Houston*, 114 U. S. 622-631; *Walling* vs. *Michigan*, 116 U. S. 446-455; *Pickard* vs. *Car Co.* 117 U. S. 34; *Railroad Co.* vs. *Illinois*, 118 U. S. 557.

"*But wherever such laws* (state laws) instead of being of a local nature and not affecting interstate commerce, but incidentally, *are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the class of those laws wherein the jurisdiction of Congress is exclusive.*"

Bridge Co. vs. *Kentucky*, 154 U. S. 204-212.
Brown vs. *Houston*, 114 U. S. 622.
Bowman vs. *Railroad Co.* 125 U. S. 465.

"Subject to certain exceptions only, which exceptions pertain in no respect to subjects of a national character, the States have no right to impose restrictions, either by way of taxes, discrimination or regulation of commerce between the States."

Bridge Co. vs. *Kentucky*, 154 U. S. 204-212.
Claire County vs. *Inter-State Transfer Co.*, 192 U. S. 454.
To the same effect see also:
Krutcher vs. *Kentucky*, 141 U. S. 47.
Hanely vs. *Railroad Co.*, 187 U. S. 617.
Caldwell vs. *North Carolina*, 187 U. S. 622.
Kelly vs. *Rhoades*, 188 U. S. 1.

Telegraph Co. vs. *Philadelphia*, 190 U. S. 160-162.

So it has been held that where a corporation—instead of a mail clerk, as in this case—is in the employ of the Federal Government, or its business is strictly commerce, inter-state or foreign, the control of such corporation by said legislative enactment is limited by this clause of the Federal Constitution for the reason that the control of such commerce, being in the Federal Government, is not to be restricted by state authority.

Pembina Mining Co. vs *Pennsylvania*, 125 U. S. 181-190.

The interest of the Federal Government in the transportation of *those having charge of its mails*, is as direct and strong as its interest in the transportation of *the mails themselves*. Any agency which tends to interfere with the rights of those in charge of the mail, whether it be a denial of the right of locomotion (as in the *Debs* case) or whether it be a denial of the right to enforce rights which he possessed elsewhere in the same relation, is such violation of the interest of the United States. If the employment of a corporation by the Federal Government protects it from state statutory regulation, does not an individual for the same reason enjoy exemption? *The authority of Congress over the laws regulating the transportation of the United States mails and those in charge thereof is exclusive.*

But on this subject, as has already been observed, it was announced by the Federal Courts that a railway postal clerk, under the common law, has the rights of a passenger. That being the recognized rule of law, it was NOT necessary for Congress to give them the same rights by legislative enactment. While Congress has at times changed the rule of the common law as announced by the Supreme Federal Court, it has never, so far as the research required in the preparation of this argument is concerned, passed a statute making a law, by statutory enactment, which had theretofore existed by judicial adjudication.

So that, even if the right of Congress were not exclusive, but co-ordinate, the rights of a railway postal clerk have been defined by the Supreme Court of the United States as

being those of a passenger, it would be a work of supererogation for Congress to make express provision with reference thereto; and Congress has, no doubt, regarded it as such.

SECOND. BUT EVEN IF THE RIGHT OF CONGRESS TO LEGISLATE WITH REFERENCE TO THE RIGHTS AND LIABILITIES OF THE PLAINTIFF WERE NOT EXCLUSIVE, SAID STATE STATUTE IS IN CONFLICT WITH THE INTER-STATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

But in addition to his rights as a railway postal clerk, coming within the operation of the constitutional provision hereinbefore quoted, is his right as a person going from one state to another in the performance of his business.

What constitutes interstate commerce, within the signification of the language used in the section of the Federal Constitution hereinbefore referred to, has been many times decided by this court.

Interstate commerce, or commerce among the several states of the Union, is commerce which concerns more states than one. Strictly construed it constitutes any intercourse and traffic, *including in these terms, navigation and the transportation and transit of persons and property*, as well as the purchase, sale and exchange of commodities.

The commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation.

Gloucester Ferry Co. vs. *Pennsylvania*, 114 U. S. 196.

The transportation of freight and passengers from one state to another, or through more than one state, either by land or by water, is interstate commerce, regardless of the distance from which it comes or to which it is bound, before or after crossing such State line. The means of transportation and the time of transit are immaterial.

Ferry Co. vs. *Pennsylvania*, 114 U. S. 196.
Steamship Co. vs. *Pennsylvania*, 122 U. S. 326.

Bridge Co. vs. *Kentucky*, 154 U. S. 204.
Kelly vs. *Rhoades*, 188 U. S. 1.

The transportation of freight and passengers from the interior of one State to a point in another State is commerce among the States, even as to that part of the voyage that lies wholly within either State, provided the transportation is under an entire contract for a continuous voyage.

Railway Co. vs. *Illinois*, 118 U. S. 557.

A state statute which only assumes to regulate those engaged in interstate commerce while passing through the particular State is nevertheless void because it in effect necessarily regulates and controls the conduct of such persons throughout the entire voyage which stretches through several states.

Hall vs. *DeCuir*, 95 U. S. 485-489.

Any regulation of transportation from State to State, whether upon the high seas, the lakes, the rivers, *or upon railroads*, or upon artificial channels of communication, operates as a regulation of interstate commerce, and if imposed by a state is void.

State Freight Tax Case, 15 Wall. 232.

A state statute prohibiting discrimination in rates of carriage of passenger or freight, *or in facilities furnished*, is void so far as it applies to the interstate transportation of freight and passengers.

Railroad Co. vs. *Illinois*, 118 U. S. 557

THIRD. THE INTERSTATE PASSENGER IS COMPREHENDED BY THE CONSTITUTIONAL PROVISION AS WELL AS THE INTERSTATE CARRIER.

The interstate clause of the Federal Constitution includes those who, in the prosecution of their business, are transported from one state to another, as well as those engaged in the business of interstate transportation. Any statutory provision which interferes with the substantial rights of those so transported is such regulation of interstate commerce. The power to regulate rights and duties of all persons and corporations

within the limits of the State cannot extend so far as to thereby regulate interstate commerce.

Railway Co. vs. *Murphy*, 196 U. S. 194-206.

The former utterances of this court in the "separate coach law" cases permit of no other conclusion.

Hall vs. *DeCuir*, 95 U. S. 485.
Railway Co. vs. *Mississippi*, 133 U. S. 587.
Plessy vs. *Ferguson*, 163 U. S. 537.
Railway Co. vs. *Kentucky*, 179 U. S. 388.

While in none of the foregoing cases did it become necessary for this court to determine the validity of the separate carriage laws as affecting the rights of an interstate passenger, it was, nevertheless, deemed proper in the language by it employed, in the opinion therein rendered, to preclude any construction which would, or could, in any way deprive a colored person, being carried into two or more states in a passenger train, of any of the rights which were enjoyed by a white person under the same conditions. The following language runs through most of these decisions:

> "No question arises under this section as to the power of the state to separate in different compartments interstate passengers, *or to affect, in any manner, the privileges and rights of such passengers.*"

The foregoing contention is sustained by the opinion of the Court of Last Resort of the State of Maryland, in the case of *Hart* vs. *State*—wherein was involved the rights of a colored interstate passenger under the separate coach law of the State of Maryland. The syllabus of the case is as follows:

> "Though Acts 1904, page 186, c. 109, requiring carriers to provide separate coaches for the transportation of white and colored passengers and making it an offense for a passenger to refuse to occupy the car to which he is assigned by the conductor, is valid in so far as it affects commerce wholly within the state, *it is invalid as to interstate passengers under the commerce clause of the Federal Constitution.*"
>
> *Hart* vs. *State*, 60 Atl. Rep. 457.

The Court in this case, in the course of its opinion after a review of the cases decided by the Supreme Court of the United States on this subject, says, (p.463):

> "Although we have said above that there was a distinction between this case and that of Hall vs. DeCuir we are of the opinion that the Supreme Court has intimated very strongly that when a case such as this comes before it for decision the same conclusion would be reached as in that case—that the law was contrary to the commerce clause of the Constitution. * * * Without further discussing the subject, we are convinced from what it has already said, that the Supreme Court, will, when called upon to determine this precise question, decide that such a law as this is invalid, in so far as it affects interstate passengers, and, being of that opinion, we must accept that as the law by which we are to be governed."

If the necessity to sit in a certain car, or in a prescribed compartment of a certain car, is in violation of the interstate commerce clause of the Federal Constitution, it requires no argument to establish the contention that the taking away of property rights, or of causes of action, from an interstate passenger upon entering the State wherein said Statute is operative, would contravene the provisions of the same section of the Federal Constitution. Under the decision in the cases of the "separate coach law" just referred to, the contention of the defendant in error, that the Pennsylvania Statute of April 4, 1868, controls the rights of plaintiff, must necessarily fall; for, if the statute be held to have application to traffic within that state alone, and to have no application to the class of persons in said statute referred to, who are engaged in interstate commerce, then, in that event its provisions are not applicable to the cause of action of the plaintiff herein attempted to be enforced; if, on the other hand, it be held to control those coming into the State from other states engaged in interstate business, the statute, as to such persons, at least, must be held to be void.

As we have heretofore seen the plaintiff was a subject of interstate commerce, whether he be considered as a part of

the operations of the Federal Government in the operation of its railroad post offices, from state to state, or whether he be considered as a citizen traveling from one state to another in the pursuit of his business.

We have also seen that by the terms of the Act of 1868, a postal clerk loses his rights as a passenger upon entering into the State of Pennsylvania, acting as such Railway Postal Clerk on a railroad train. By the provisions of this Act, he was, therefore, deprived of the right, which he possessed in the State of Ohio, and which he possessed in the State of Pennsylvania, prior to the passage of that Act, of recovering from the railroad for the negligent acts of its employes, when his injuries resulted therefrom.

The effect of the statute of Pennsylvania, construed and applied by the Supreme Court of that State, is to affect the rights of interstate passengers and to deprive the employes of the United States Government, into whose care it has entrusted its mails, of the status and rights theretofore enjoyed by them under the same conditions, thus affecting the rights of these individuals. *Whether they be considered in their capacity of guardians of the United States mails, or as interstate passengers, the statute is a discrimination against, and interferes with, this class, and, therefore, comes within the inhibition of the Constitution.*

It is not necessary to show that the particular pursuit is, as a result of the statutory provisions, compelled to terminate,—for merchandise will be shipped, and colored people will travel, notwithstanding the discriminating statutory provisions against them.

In the case at bar the tendency of interference is greater than in the case of the merchant and his commodities of barter, for the reason that in the latter case a part only of their value is proscribed—which is unconstitutional as held in *Caldwell* vs. *North Carolina*, 187 U. S. 622— while in the case of the former the entire cause of action for the recovery of money for the negligence of the railroad's servants, theretofore enjoyed by him, is taken from him; in the case of the negro a sentiment, based on civil equality is being infringed; while in the case of the railway postal clerk a substantial pecuniary right is being taken from him. Each is a sub-

stantial right; each is guarded by the protective provisions of the Federal Constitution.

To contend that such deprivation of the rights of the class of individuals constituting the railway postal clerks does not have a tendency to interfere, not only with the operation of the postal service, but also with interstate commerce, is to quibble with form and ignore substance. The conclusion is irresistible that the *particular effect* of a statutory provision (such as the Pennsylvania enactment under consideration), whereby legal and valuable rights are taken from a class engaged in interstate commerce, is to interfere with such commerce.

II.

THE PENNSYLVANIA STATUTE IS INVALID BECAUSE IT IS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

It is contended that the Act of April 4, 1868, contravenes the Fourteenth Amendment of the Federal Constitution in the following respects:

First. That it deprives the plaintiff of property without due process of law.

Second. That it abridges his privileges and immunities as a citizen of the United States.

Third. That it denies to him as a postal clerk within the jurisdiction of that state the equal protection of the laws.

Of these in their order:

FIRST. THAT IT DEPRIVES THE PLAINTIFF OF PROPERTY WITHOUT DUE PROCESS OF LAW.

When the plaintiff entered into his contract with the Federal Government to serve as a railway postal clerk one of the conditions of such employment was that he was to be carried on the railway cars while on duty, without the payment on his part of any fare to the railroad on which he was thus being carried; it was the common law, as announced by the courts of last resort of both the State of Ohio and of

the United States, that his rights while travelling in railway postal cars in the performance of his duties, were those of a passenger. When the defendant railroad company entered into the contract with the Federal Government for the carrying of its mails and railway postal clerks it did so knowing that it was the common law of the land that the railway postal clerks, whom,—by the terms of said agreement for the full compensation to it paid by the Federal Government,—it had agreed to carry, had the rights of a passenger. So far then, as the terms of the contracts, both between the Federal Government and the plaintiff and between the Federal Government and the railroad company, are concerned, the plaintiff had the rights of a passenger in the State of Ohio, while being conveyed on that part of said road which lies within the State of Ohio, and had the same rights in the State of Pennsylvania, as we have heretofore seen, prior to the enactment of said statute. There was no change in the conditions or contract rights of the parties. By the enforcement of a statute, by the terms of which the plaintiff loses his rights as passenger upon crossing the line dividing said states and is given the rights only of an employe of the railroad company (as the result of which he has no cause of action for the negligent acts of employes operating the trains of the railroad company) he is thereby deprived of property without due process of law.

A. The Statute denies the plaintiff the right of due process of law in that it abridges his liberty of contract.

Said statute is an unwarranted invasion of the rights of the Federal Government, the railway postal clerk and the railroad company, and each of them, to make contracts by the provisions of which a railway postal clerk shall be entitled to enjoy, and the railroad company obliged to give to him, the rights of a passenger while he is being conveyed by it for hire; and especially so inasmuch as they are rights which existed prior to the enactment of such statute. The railway postal clerk, prior to the enactment of the statute of 1868, had a right to contract with the Federal Government to be carried with the rights of a passenger or that he should have the right to recover against the railroad company for the negligence of its servants on the road on which he was engaged

as such railway postal clerk. The railroad company and the Federal Government at that time had a right to make the same kind of a contract. But the statute of 1868, by its terms, in effect, declares that no such contract shall be made as against *railroad companies;* and if such an attempt were to be made the statute would step in, and by its provisions say: While those rights once belonged to the postal clerk by the common law of this state, they are no longer rights, but on the contrary you cannot make them such even by contract for it is against the legislative will of the state for a railway postal clerk to have any greater rights than an employe of the railroad company on which he is being carried. *Such a provision abridges the liberty of the railway postal clerk, be he a citizen of the State of Pennsylvania or any other state, to acquire contract rights and to enjoy the same.*

The right of contract, and the power to make a contract, are "property" within the meaning of the State and Federal organic law. The privilege of making and entering into contracts is a *property right.* It is an essential incident to the acquisition and protection of property, and is such right as the legislature may not arbitrarily and without sufficient cause either abridge or take away.

Allgeyer vs. *Louisiana,* 165 U. S. 578.
Lochner vs. *New York,* 198 U. S. 45-53.
Cleveland vs. *Construction Co.,* 67 Ohio State, 197-219.
Palmer vs. *Tingle,* 55 O. S. 423.
Ritchie vs. *People,* 155 Ill. 98.
Low vs. *Printing Co.,* 41 Neb. 127.
Frorer vs. *People,* 141 Ill. 171.
State vs. *Loomis,* 115 Mo. 307.
Com. vs. *Perry,* 155 Mass. 117.
People vs. *Hawkins,* 157 N. Y. 1.
Leep vs. *Railroad Co.,* 58 Ark. 404.

In the case of *Allgeyer* vs. *Louisiana,* 165 U. S. 578, wherein the question was made as to whether the state statute inhibiting the making of a contract of insurance by an insurance company which had not complied with the laws of said state was in contravention of the Federal Constitution, when the contract was made and had been executed in another state

than that wherein the statute was enacted, the insured in said case being a resident and citizen of said state, it was held by the Supreme Court of the United States that the interference growing out of said statutory inhibition "is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy. * * * We think the statute is a violation of the fourteenth amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restrain of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, *and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

To the same effect see:

Butchers vs. *Crescent City Co.*, 111 U. S. 746.
Lawton vs. *Steele*, 152 U. S. 136.
Long vs. *State*, 74 Md. 565.
Luman vs. *Hutchins Bros.*, 90 Md. 25.
Ex Parte Singlee, 96 Cal. 354.
Bailey vs. *People*, 190 Ill. 28.
Re Hong Wah, 82 Fed. Rep. 623.
Tiedeman's State & Federal Control, Sections 120-147.

"The legislature cannot prevent persons who are *sui juris* from laboring, or from making such contracts as they may see fit to make relative to their own lawful labor."

Gillespie vs. *People*, 182 Ill. 176.

The railroad company could not impose a condition in its contract with the United States relieving it from liability for negligent injury to said postal clerks.

Seybolt vs. *Railroad Co.*, 95 N. Y. 562-574.

On what ground, therefore, can the legislature of a state impose such a condition on the making of a contract? If the legislature cannot interfere with the right to contract as between master and servant, how can it be held that it is competent to interfere with the right to contract as between the United States and the railway postal clerk, or between the United States and the railroad company, as to the rights which such postal clerk shall have as between himself and the carrier who, by the terms of the contract between the United States and the postal clerk, is to carry him for hire? Suppose there were an express provision that the Government should provide transportation for him with the rights of a passenger, would it be contended that the state legislature could provide that no such contract could be made, as it was against the public policy of the state that railway postal clerks should, while engaged on trains, have the rights of a passenger or greater rights than an employe of the railroad company? *By the terms of the statute the right of the postal clerk to contract for a service, as such, with the rights of a passenger, while on duty on a railway post office car, as the right exists under the common law, is taken away. The legislature has no more power to interfere with contract rights in the one case than it has in the other.*

The right to contract, guaranteed by the provisions of the Federal Constitution, is not more sacred than is the right to take advantage of a cause of action growing out of the breach of a contract when made. The latter is a corollary of the former. A provision of the statute taking from an individual a cause of action which he enjoys in every state of the Union, and which he had enjoyed in the state of its enactment, prior to the time it was so enacted, is in conflict with the Fourteenth Amendment of the Federal Constitution in that it deprives him of his rights without due process of law for the same reasons, and on the same principles, as those set forth by this court in the cases herinbefore referred to.

B. The Statute denies the plaintiff the right of due process of law in that it deprives him of his right of remedy for negligent injury.

While the Fourteenth Amendment created no new rights, privileges, immunities and process of law, it did, and does, guarantee pre-existing rights.

That a postal clerk was a passenger, and had the rights of such to recover for injuries sustained by him while on a railroad train, when such injuries were received by reason of the negligence of the servants of the railroad company, was the law of the State of Pennsylvania, we have heretofore seen in the cases of *Lockhart* vs. *Lichtenthaler*, and *Railroad Company* vs. *Henderson*, *supra*, prior to the enactment of this statute. By its provisions the remedy theretofore possessed by a railway postal clerk, to recover for an injury suffered by him by reason of the negligence of a servant of a railroad transporting him, is taken from him not only without "*due*" but without *any*, process of law.

> "It is not an easy task to deduce either from reason or the authorities a satisfactory definition of 'law of the land' or 'due course of law.' We feel safe, howevever, from either standpoint, in saying these terms do not mean any act that the legislature may have passed if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. Whatever these terms may mean more than this, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one 'shall have remedy',—that is proper and adequate remedy,—thus to be ascertained. *To refuse hearing and remedy for injury after its infliction is small remove from infliction of penalty before and without hearing.*"
>
> *Hanson* vs. *Krehbeil*, (Kans.) 64 L. R. A. 790-792.

Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer, and so to contend would be to say that one's property may be taken without due process of law.

Pumpelly vs. *Canal Co.*, 13 Wal. 166.
State vs. *Julow*, (Mo.) 29 L. R. A. 257.
Re Jacobs, 98 N. Y. 98.
State vs. *Goodwill*, 33 W. Va. 178, s .c. 6 L. R. A. 621.

That the right to recover in an action for liability for damages to reputation, cannot be abridged by statute has been established by the adjudications of a number of courts.

Park vs. *Detroit Free Press Co.*, 72 Mich. 560.
McGee vs. *Baumgartner*, 129 Mich. 287.
Hanson vs. *Krehbeil*, (Kans.) 64 L. R. A. 790.
Osborne vs. *Leach*, 135 N. Ca. 628, s. c. 66 L. R. A. 648.

If the right cannot be abridged when it pertains to damages to the reputation surely it should not be permitted to be limited, or as in the case at bar wholly abrogated, when it affects the physical being, entailing bodily pain, as well as the mental anguish incident to injury, and resulting in loss of power of self maintenance. In each instance the respective statutes take from the injured person—whether the injury be to the reputation or to the body—the right of remedy by due course of law theretofore existing for the injury so suffered, and is, therefore, invalid.

SECOND. THAT IT ABRIDGES PLAINTIFF'S PRIVILEGES AND IMMUNITIES AS A CITIZEN OF THE UNITED STATES.

Whatever may be the doubts as to the correctness of the holdings, and reasons given therefor by the judges making them, as to what is meant by the language used in the Fourteenth Amendment, "privileges and immunities of citizens of the United States," the claim which is the basis of this contention on the part of the plaintiff in error herein, cannot be the subject of challenge on the ground that the right which he complains he has been deprived of does not belong to the class of rights comprehended by the phrase just quoted. For even by the most limited construction (that given by Mr. Justice Miller in the *Slaughterhouse Cases*, 16 Wall. 36) it is conceded that one of the privileges and immunities of a citizen of the *United States*, in contradistinction to a citizen of a *state* is, "the right to use the navigable waters of the United

States, however they may penetrate the territory of the several states" (16 Wall. 36-79). No distinction exists, so far as the rights herein claimed are concerned, between such navigable waters and the trunk lines of the railroads extending and operating into two or more states. The right to travel carries with it the rights, privileges and immunities which are incident to that act. The plaintiff in error while using the interstate highway in the course of the prosecution of his business, had all the rights of a passenger while in every state of the Union, except the State of Pennsylvania, and these rights were vouchsafed to him, both by contract, and the rule of public policy, as announced by the Court of last resort of the land, in the cases hereinbefore referred to, of which, *inter alia*, was that of *Railroad Company* vs. *Lockwood*, 17 Wall. 357.

One of those privileges growing out of his relation as passenger was the right to recover for injuries sustained by him resulting from the negligence of the railroad company or its servants in the operation of its trains. The taking away of that right, from a person so using said means of public travel, by a state by statutory enactment comes within the inhibition of that part of the Fourteenth Amendment providing that "no State shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States," and is just as prejudicial to the rights of the person so deprived thereof as would be a state statute denying the right of an individual to take advantage of the national bankruptcy act within that state.

THIRD. THAT IT DENIES TO HIM AS A RAILWAY POSTAL CLERK WITHIN THE JURISDICTION OF THAT STATE THE EQUAL PROTECTION OF THE LAWS.

In order to appreciate the pertinency of this principle in the case at bar it is necessary to briefly review the rights of postal clerks in the State of Pennsylvania prior to the enactment of the law of 1868.

Prior to the enactment of the statute railway postal clerks must, in the light of the authorities referred to in the early part of this brief, be held to have had a cause of action against a railroad company for the negligence of its servants. The

Supreme Court of Pennsylvania in the case of *Railroad Company* vs. *Price*, 96 Pa. St. 256, wherein the act herein under consideration was construed to deprive a railway postal clerk of the rights of a passenger, in speaking with reference to the purpose of the statute says on page 264.

> "The Act of 1868 was manifestly intended to create a third class, who were neither employes nor passengers, namely, persons who are 'lawfully engaged or employed in or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein, of which such person is not an employe.' *This class, prior to the Act of 1868, were entitled, under the decision in Cottawissa Railroad Company vs. Armstrong, supra, to recover against the company for injuries resulting from the negligence of the employe.*"

The statute, by its terms, therefore, as held by the court of last resort of the state construing the statute, singles out of the only two classes of persons which under the law had theretofore been known on public conveyances (to-wit: employes and passengers) certain individuals of the latter class who had theretofore been entitled, as decided by the court of last resort of that jurisdiction, to recover against the company for injuries resulting from the negligence of an employe, (96 Pa. St. 265, top of page) and created therefrom a third class (to-wit: "those lawfully engaged or employed in or about the roads, works, depots and premises of the railroad company or in or about any train or car therein, of which such person is not an employe") and having created such third class, thereupon took from it a right of action to recover against the company for injuries resulting from the negligence of an employe by providing in said act that "a right of action to recover in all such cases against the company shall be such only as would exist if such person were an employe." This classification so made by it was absolutely unnatural, arbitrary, and capricious, and based upon fiction and not upon fact. For (as construed by the Court of last resort of the state wherein it was enacted) it makes a railway postal clerk, who was in no way under the control of the railroad company or its employes, as we have

heretofore seen, an employe of said company, as a matter of law in spite of the facts existing to the contrary.

The statute, by its terms, likewise singles out of the several kinds of common carriers, for the bestowing of this exemption of liability, railroad companies only. What reason exists why this one kind of common carriers should be favored with this special immunity to the exclusion of all other kinds of common carriers is not only not apparent, but, on the contrary, is conclusive of the vice inherent in the statute making the discrimination.

The clear purpose of the act, as frankly stated by counsel for the defendant in the *Price* case in their brief, heretofore referred to, was:

> "The burden on the railroad companies of the state to pay when any accident happen and personal injuries or death result to any such persons was too great, and the act of 1868 was passed to relieve them of it."

That the arbitrary classification, such as the one in said statute attempted, is prohibited by the part of the Fourteenth Amendment herein considered, is established by the utterances of a long line of Courts of last resort, and text writers.

> "The inhibition that no state shall deprive any person within its jurisdiction, of the equal protection of the laws, was designed to prevent any person, or class of persons, from being singled out as a special subject for discrimination or hostile legislation."
>
> *Brannon's Fourteenth Amendment*, 322.
> *Pembina* vs. *Penna.*, 125 U. S. 188.

> "What is called class legislation would belong to this category and would be obnoxious to the prohibitions of the Fourteenth Amendment. * * * *The Fourteenth Amendment extends its protection to races and classes, and prohibits any legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.*
>
> "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment and in all

classes it must appear, not merely that a classification has been made, but also that it has been based on some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

Railroad Co. vs. *Ellis*, 165 U. S. 150.

Smyth vs. *Ames*, 169 U. S. 466.

Cotting vs. *Goddard*, 183 U. S. 79.

"The Fourteenth Amendment of the Constitution in declaring that no State shall deny to any person within its jurisdiction the 'equal protection of the laws' imposes a limitation upon the exercise of all the power of the state which can touch the individual or his property. * * *

"The 'equal protection of the laws' to any one implies not only that he has an equal right to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances."

Railroad Tax Cases, 13 Fed. Rep. 722. 18 Fed. Rep. 385.

"The conclusion is, that although a law is general and constitutional when it applies to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges *or imposes peculiar disabilities or burdensome conditions in the exercise of a common right*, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

Passadena vs. *Stinson*, 91 Cal. 238.

Lunnan vs. *Hutchinson Bros. Co.*, 46 L. R. A. 393.

State vs. *Walsh*, 35 L. R. A. 231.

Ex Parte Leo Jentzsch, 32 L. R. A. 664.

"If a statute attempts to create distinctions and classifications between the citizens of this state, the basis of such classification must be natural and not arbitrary. If the classification be made for the purpose of conferring upon a class the benefit of some special right, privilege, immunity or exemption, there must be some good or valid reason why that particular class should alone be the recipients of the benefit. If the classification be made for the purpose of subjecting a class to the burden of some special disability, duty or obligation, there must be some good or valid reason why that particular class should alone be subject to the burden."

Stratton vs. *Morris*, (Tenn.) 12 L. R. A. 70.

Dixon vs. *Poe*, 60 L. R. A. 308. 33 L. R. A. 589-592.

Railroad Co. vs. *Taylor*, 86 Fed. Rep. 168.

Cooley on Constitutional Limitations, 393.

FOURTH. IS THE CLASSIFICATION, AND DISCRIMINATION AGAINST THE SAME, MADE BY ACT OF 1868, ARBITRARY, AS RELATING TO POSTAL CLERKS?

In view of the foregoing facts and authorities reviewed and cited, the question is now presented to us as to whether or not the facts in the case at bar bring it within the principles therein enunciated. An affirmative answer is inevitable.

In the first place, the act as construed by the Supreme Court of Pennsylvania has taken railway postal clerks out of the passenger class, to which they *in fact* and *in law* belonged prior to the enactment of said statute, and has placed them in a class with the servants of the railroad company, to which prior to the enactment of said statute they neither in fact nor law belonged, and to which they do not now belong. To contend that it is a business classification which is attempted by the statute is no answer to the facts herein in controversy. As to the liability of the railroad company to those whom it was conveying for compensation there was but one class, to-wit, passengers, and it is immaterial as to what the business of any one or more of them may have been. It would be no more

arbitrary if the legislature were to select from the passengers conveyed by the railroad company on a ticket purchased by the principal, the agent of any one of said carrier's shipping patrons, or the "commercial drummer" travelling on a mileage book, purchased by his employers, and to provide that all persons riding on such books should have only the rights of the railroad employes in an action for the recovery of damages for the negligence of the railroad company's employes.

The vice lies in the fact of the discrimination between people riding on the train *for compensation*, (no matter by whom paid) the natural class—in respect to the railroad company's liability to them for negligence in its carriage of them—in that it divides into two classes those who are thus being conveyed by a railroad company for compensation received directly or indirectly by it, and takes from one of the classes, so created, rights previously possessed by it, and rightfully belonging to it. The selecting out of this "natural class" of any individuals because they may be employed in a certain kind of business, is unreasonable and arbitrary and beyond the power of a state legislature to accomplish. And the fact that it relates to those who may be "engaged or employed" on the train so conveying them is no reason, as we shall hereinafter see, for said classification, *provided* that engagement or employment does not relate to the operation of the railroad business as such. That it does not, and that it has no connection in any way therewith, is established by the admission of facts in this case (Record, p. 30, fifth paragraph).

It would seem a startling proposition that in all those cases where persons traveling on railroads, engaged not in their own business, but that of others, and when their fare is paid by their employers, they are entirely at the mercy of the railroad agents, and without redress,, if injured through the recklessness or want of care and skill of said railroad agents, on the ground that they *happen to be engaged*, in the performance of their duties to their master, *on a railroad train;* whether this engagement is in the protection and distribution of the United States mail for the United States Government, as railway postal clerks; or whether the one so conveyed be engaged on the train in the transmission of some valuable message, either for the Federal Government or for an indi-

vidual employer. When the carrier has accepted the required compensation for the transportation of an individual and it fails to carry him safely by reason of the negligence of either itself or its servants, it should not be relieved of liability for such negligence, no matter what the business of the individual so injured may be. *As to it, so far as liability for the negligent acts of itself or its servants is concerned, there should be but one class of those whom it carries for hire, to-wit, passengers.*

But, again, it is contended by the plaintiff, that this provision is an arbitrary creation of a class for the reason that it selects only those employes of the Federal Government, placed in charge of its mails, who perform their duties, *on railroad trains*, leaving those members of the same class having charge of the Government's mail on steamboats, stage coaches, and other means of conveyance, under operation by common carriers, in the enjoyment of the same rights which were possessed by the entire class before the passage of this act, discriminating only against that sub-division of the class employed on railroad trains.

The question asked by the Supreme Court of Kansas in the case of *State* vs. *Haun*, 61 Kans. 146, and which was approved by the Supreme Court of the United States in the case of *Cotting* vs. *Stock Yards Company*, 183 U. S. 107-108, is equally applicable to the case at bar. The words of the Court referred to are:

> "Why should not the nine employes who worked for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation?"

For the same reason the question is asked in this case, why should not the employes of the Federal Government having charge of its mails on railroads in the State of Pennsylvania be equally protected with those of its employes having charge of its mails on stage coaches, steamboats and other means of conveyance by common carriers?

In the case of *Cotting* vs. *Stock Yards Company*, *supra*, the Court in its consideration of the proposition as to whether the laws secured to an individual an equal protection under certain conditions, cited certain supposed instances in the

course of its opinion (pp. 100-101) but none of said instances go to the extent of supposing a state of facts such as those which exist in this case where a class of individuals have taken from them their cause of action *entirely*. The Court, in the *Cotting* case, deemed the illustrations with reference to a plaintiff or defendant having certain conditions imposed upon their rights of setting out a cause of action or defense, extreme; the facts in this case, where the cause of action *itself* is taken away, is even more extreme, and, therefore, the necessity is the greater for a judicial adjudication that said statute is void.

It should also be observed that the immunity from liability to postal clerks given by this statute is confined to *railroad companies* alone of the class of common carriers to which they belong. The statute, therefore, contravenes the Fourteenth Amendment both in its classification as to passengers and railway postal clerks travelling upon railroad trains and likewise as to common carriers; in each instance, granting a privilege and an immunity to the railroad company which was not possessed theretofore by it.

III.

THE CONSTITUTIONALITY OF THE STATUTE CANNOT BE SUSTAINED ON THE GROUND THAT IT IS AN ALLEGED POLICE REGULATION.

The only defense of the statute herein under consideration that has been attempted, either by the defendant in this case or by the Supreme Court of the State of Pennsylvania in sustaining its state constitutionality, is that it is a police regulation. Two questions are presented, therefore, for consideration in determining whether this is a valid defense of this statute, (1) Under what circumstances a state statute which contravenes rights guaranteed by the Federal Constitution can be saved on the ground that it is a police regulation, and (2) Can it be invoked as a defense under the facts of this case?

FIRST. UNDER WHAT CIRCUMSTANCES CAN A STATE STATUTE WHICH CONTRAVENES RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION BE SAVED ON THE GROUND THAT IT IS A POLICE REGULATION?

While it is the law as established in the jurisprudence of this Court that the states possess the power to enact such regu-

lations as may be reasonable, necessary and proper for the protection of the public health and comfort, it is equally well established that care must ever be exercised by this tribunal, as the final bulwark of constitutional protection, that no regulation, although it be adopted for the protection of the public health and comfort, shall violate rights secured by the fundamental law. For the police power is too vague, intermediate, and dangerous to be left without control, and when the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity and to nullify the legislative attempt to invade the citizen's right; for, to hold that every act of the general assembly passed under the guise of an exercise of the police power or sought to be defended upon that ground, was beyond judicial control, would render every guarantee of personal right found in the constitution of little or no value. *The police power must be exercised subject to the provisions of the Constitution of the United States.*

> "To what purpose are limitations committed to writing, if those limits may at any time be passed by those intended to be restrained?"
>
> *Marbury* vs. *Madison*, 1 Cranch 137 (Chief Justice Marshall.)

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character

is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

Lochner vs. *New York*, 198 U. S. 45-64.

"A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict, with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

Jacobson vs. *Massachusetts*, 197 U. S. 11-25.

"The right of a citizen to the equal protection of the law cannot be trampled under foot under the guise of a police regulation, when it is manifest that such is not the object and purpose of the regulation."

Railroad Co. vs. *Husen*, 95 U. S. 465-471-473.
Henderson vs. *New York*, 92 U. S. 259.
Lesy vs. *Harding*, 135 U. S. 100.
Minnesota vs. *Barber*, 136 U. S. 313-319.
People vs. *Shipping Co.*, 107 U. S. 59-63.
Walling vs. *Michigan*, 116 U. S. 446-460.
People vs. *Hawkins*, 157 N. Y. 1.
Godcharles vs. *Wigman*, 113 Pa. St. 431.
Black vs. *Schwartz*, (Utah) 65 L. R. A. 308.
State vs. *Timber Co.*, 65 L. R. A. 588.
State vs. *Walsh*, 35 L. R. A. 231.
State vs. *Gardner*, 58 O. S. 610.
Coal Co. vs. *Rosser*, 53 O. S. 23.
Re Preston, 63 O. S. 428.
Miller vs. *Crawford*, 70 O. S. 207.

"The laws enacted in exercise of the police power must be reasonable, and are also subject to the pro-

visions of both the Federal and State Constitutions, and they are also subject to judicial scrutiny."

Yick Wo vs. *Hopkins*, 118 U. S. 372.
Lawton vs. *Steele*, 152 U. S. 133.

"The Courts are not bound by mere terms nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solumn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature have transcended limits of their authority. If, therefore, the statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects; or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

Mugler vs. *Kansas*, 123 U. S. 661.

"Such laws must tend towards the preservation of the lives, health, morals, or welfare of the community, and the Court must be enabled to see more clear the real connection between the assumed power of the law and the actual provisions thereof, and that the latter will tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power."

Re Jacobs, 98 N. Y. 98.

"To justify a state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *The legislature may not, under guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.* In other words, its determination of what is a proper exercise of the police power

is not final or conclusive, but is subject to the supervision of the Courts."

Lawton vs. *Steele*, 152 U. S. 133.

"The Fourteenth Article of Amendment of the Constitution of the United States after other provisions which do not touch this case, ordains: 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. * * * And the first one, as stated by Chief Justice Waite in *U. S.* vs. *Cruikshank*, 92, U. S. 542, 554, repeating the words Mr. Justice Johnston in *Bank* vs. *Okely*, 4 Wheat. 235-244, was intended *'to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice.'* "

Scott vs. *Neal*, 154 U. S. 45.

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this Court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme

law.' The state has undoubtedly the power by appropriate legislation, to protect the public morals, the public health and the public safety, but, if, by their unnecessary operation its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.' "

Connolly vs. *Sewer Pipe Company*, 184 U. S. 540.

"It is now thoroughly well settled by decisions of this Court that municipal by-laws and ordinances and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the Courts, with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property."

Dobbins vs. *Los Angeles*, 195 U. S. 223.

The foregoing authorities demonstrate the limitation of the applicability of the doctrine known as "police power."

POLICE POWER *vs.* PUBLIC POLICY.

As we have seen in an earlier part of this argument it was, prior to the enactment of the statute of 1868, and now is, the law of the State of Pennsylvania, that a common carrier cannot, by contract, relieve itself of liability for the negligent acts of either itself or its servants, and that this rule is bottomed on the ground of *public policy*.

"The reason for this qualification of the power to limit liability rests in public policy."

Railroad Co. vs. *Reordan*, 119 Pa. St. 557.

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the

greatest possible care and diligence. And whether consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents."

Philadelphia & Reading R. R. vs. *Derby*, 14 How. 486.

The language of this Court in the foregoing case (which case arose in Pennsylvania) was followed and approved by the same Court in the following language:

"We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law."

The Steamboat New World vs. *King*, 16 How. 469-474.

"Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, *would be subversive of the very object of the law.* * * *

"Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—*an excuse so repugnant to the law of their foundation and to the public good*—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. * * *

"It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

Railroad Co. vs. *Lockwood*, 17 Wall. 357-378-381-384

"It is settled in the Courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable and will be deemed as wanting in the element of voluntary assent; *and, besides, that such conditions are in conflict with public policy.* This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary."

The Kensington, 183 U. S. 263-268.

"It cannot be denied that pecuniary liability for negligence promotes care; and if public carriers in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence.

"That the stipulation in the contract, exempting the company from liability for negligence, constituted no defense to an action brought by the shipper for personal injury caused by the negligence of the servants of the company in the management of its trains, *such stipulation being against the policy of the law*, and therefore void."

Railroad Co. vs. *Curran*, 19 O. S. 1-14.

Authorities, were it necessary, could be cited from the courts of last resort of almost every jurisdiction of the United States to sustain the proposition that limitation of the liability of a carrier for the negligence of itself or its servants is contrary to public policy. The Pennsylvania statute, as construed by the Court of Last Resort of that jurisdiction, provides that such limitation can be effected. We have, therefore, two diametrically opposed holdings with reference to the

limitation of liability of a carrier for the negligent acts of its servants: one based on public policy; the other based on the doctrine of police power. But, if an attempt at limitation of liability by contractual stipulation cannot be permitted on the ground that it contravenes public policy, a limitation by legislative enactment, whereby constitutional rights are infringed, for the same, and more potent reasons, cannot be permitted; for, "persons may voluntarily contract to do what no legislature would have the right to compel them to do."

Railway Co. vs. *Smith*, 173 U. S. 684-697.

It can hardly be claimed, at least with any degree of tenability, that a thing can be and not be at the same time for the same reason; that a rule of legal liability is valid and is invalid at the same time on the ground of public policy. For police power is only another way of saying public policy in this instance. The Supreme Court of Pennsylvania has taken the extreme position of attributing to its legislature the purpose of declaring a rule of non-liability with reference to a certain class of common carriers—*railroad companies*—to a certain class of those whom it carries for hire, on the ground that it conserves the public welfare, in face of the fact that it is held in that jurisdiction, as well as every other jurisdiction, in conformity to the common law rule, long established and adhered to, both in English and American Jurisprudence, that the public welfare is best conserved by the opposite rule, imposing liability.

SECOND. CAN THE DEFENSE OF POLICE REGULATION BE INVOKED UNDER THE FACTS OF THIS CASE?

The whole contention of defendant in error on this proposition proceeds on the theory that the mail clerk is a fellow servant of an employe of the railroad company and that they work "shoulder to shoulder with railroad men" and "perform duties of a similar character and in the same places, and who are subject to the identical risks." A theory which is in no manner based on fact so far as it relates to a railway postal clerk. In the case at bar the plaintiff was injured by a servant of the railroad company who was a member of the construction train, who had never seen plaintiff, and whom the plaintiff

had never seen, and, for whose negligence or incompetence plaintiff, even if it had been known to him, had no right to make complaint, for they had not a common master. The risks to which a railway postal clerk is subject, so far as the negligence of the railroad company and its servants is concerned, differs in no respect, *in kind*, from the risk to which any other passenger on the same train is subject. When a train jumps the track by reason of an open switch, and rolls down a high embankment, not only the occupants of the postal cars, but those in the Pullman cars as well, suffer injury and death, as was the case in the accident which gave rise to this action. In what way will it tend towards the preservation of the lives, health, or moral welfare of the community to deprive the railway postal clerk of his right of action as a passenger against the company for the negligence of its employes causing his injuries? In what appreciable manner will it tend towards the accomplishment of such object? It is clear it cannot help the community and it is apparent that depriving postal clerks, as a class, of their rights as passengers, will not tend to make more careful those employes of the railroad company for the protection of a railway postal clerk whom they have never seen, who have no control over him, and over whom he has no control, and with whom he has nothing in common, and for whose negligence said employes do not make their employers liable. Certain it is that it does not make the railroad company more careful. On the other hand it encourages negligence on its part. Experience has demonstrated that there is nothing so efficatious in effecting care on the part of a railroad company as a statute creating a new civil liability for acts caused by its own, or its servants' negligence.

In what way postal clerks, on the other hand, will be led to exercise a higher degree of care for their own safety and the safety of others by being made a fellow servant of the railroad company's employe, as claimed by defendant in error, is not apparent. Clearly no effort on his part can affect the operation of the train on which he is riding or of any other train of said road. However, as is established in the admission of facts in this case, a railway postal clerk has no control over any part of the train, except the car in which he is

riding. Of course, if the accident should happen by reason of some negligence having its origin in the postal car, there might be ground for the contention of defendant in error, but the accident in this case did not, nor does any accident, spring therefrom, nor could the railway postal clerk in any way have prevented it. No matter how great the amount of care and vigilance exercised by him the accident could not have been avoided.

The statute making the provision not only has no substantial relation to the objects for which, it is *claimed* it was passed, but is a palpable invasion of the right of one not an employe of a master to recover for the negligence of an employe of such master committed within the scope of his employment.

With the foregoing facts in mind, together with the rule of public policy hereinbefore referred to, and remembering that the railway postal clerk is carried by the railroad for hire, let us turn to the statutes and the decisions of the Supreme Court of Pennsylvania attempting to deprive the railway postal clerk of his rights to recover as a passenger for hire, for injuries sustained by him by reason of the railroad company's agents' and inquire what tenable reason is given by that Court to sustain the provisions of a statute enacted for the obvious reason of relieving the railroad companies of Pennsylvania from the liability which, as announced by the Supreme Court of the United States, *the rule of public policy* exacts from them.

The statute is held to be constitutional, so far as the state constitution is concerned, in the case of *Kerby* vs. *Pennsylvania Railroad Company*, 76 Pa. St. 506.

A railway postal clerk is held to come within the operations of the statute in the case of *Railroad Company* vs. *Price*, 96 Pa. St. 256.

An analysis of the opinions of the court in these cases may not be inappropriate.

1. Review of Kerby vs. Pennsylvania Railroad Company.

The right of the legislature of Pennsylvania to pass the act, the constitutionality of which is herein challanged, is placed by the Supreme Court of that state on the ground that

it is a police regulation. The language used by the Court on that subject is as follows:

> "The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the state, as the conservator of the lives, security and property of her citizens. It is a police regulation, which, having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert his proper remedy against the person whose act or negligence does him the injury, the law says to him that the legal principle of *respondeat superior* shall have no place in this particular relation; that as a matter of proper policy for the good of all, those who voluntarily venture into employment alongside of the servants of a railroad company, shall have just the same remedies for injuries happening in the employment that these have, and none other. In doing this, no fundamental right of the person thus voluntarily venturing is cut off or struck down. The liability of the company for the acts or omissions of others, though they be servants, is only an offspring of law. The negligence which injures is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company, for reasons of policy, can remove the imputation from the master and let it remain with the servant, whose negligence causes the injury."

In short, it is the holding of the Court in that case that in respect to the liability of a railroad carrier to a person whom such railroad company has contracted to carry in its trains, the doctrine of *respondeat superior* shall be revoked because that person happens to be employed on that train, notwithstanding the fact that his transportation has been paid; that the employment is of an entirely different character from that required in the operation of the train, and notwithstanding the fact that the person has no control or management of said train

or said railroad company, and notwithstanding the fact that the negligence causing the injury may be that of a person who is not on the train, whom the injured one has never seen and over whom he has no control.

Even under the Pennsylvania law if the injury be caused by a dangerous condition which is attributable to the failure of the railroad company to perform one of the primary duties which are owed by the master to the servant, recovery may be had therefor, notwithstanding it resulted from the negligence of one of its servants.

If the dangerous condition resulted from the negligence of one of the company's employes it is immaterial—so far as the railway postal clerk is concerned—whether the employment be rendered dangerous by reason of the negligence of the railroad company or by reason of the negligence of its employes. The *negligent act* is the proximate cause and the determining factor. If the dangerous employment be the test, then the right to recover for an injury resulting from an employment made dangerous by the negligence of the *company* should be denied, as well as where such employment is made dangerous by reason of the negligence of the *servant* of the railroad company. In addition to the unsoundness of the position taken by the Court on this proposition the reason on which it is based is inconsistent with other cases decided by it involving the question of *respondeat superior*. The line of argument by the Court is, in substance, that the liability of the company is made so by imputation of law and is not in fact the negligence of the company; and, therefore, the law which thus imputes it to the company, for reasons of public policy, can remove the imputation from the master and let it remain with the servant, whose negligence, in reality, causes the injury. But the rule of law that the principal is responsible for the acts of his agent when acting within the scope of his employment is elementary.

Railroad Co. vs. *Derby*, 14 How. 468.
Bacon vs. *Robertson*, 18 How. 486.
Railroad Co. vs. *Quigley*, 21 How. 211.
Steamboat Co. vs. *Brockett*, 121 U. S. 645.
Manufacturing Co. vs. *Rahn*, 132 U. S. 523.

The common law rule of non-liability of the master for acts of his servant causing injury to a fellow servant is an exception, based on the theory that those employed by a common master, because of the relation they sustain to, and knowledge they possess of, each other and the business in which they are engaged, are better able than the employer to guard against risks and accidents resulting from each other's negligence. *But it must be conceded that in order that two persons may be considered to be fellow servants they must be in the employ of the same master and the employment must be one having a common object.*

> "The rule is clearly a just one. The exemption of the employer from liability to a servant for the negligence of a fellow servant rests upon the implied undertaking of the servant to assume the risks necessarily incident to the service in which he engages, including the risks of the negligence of his fellow servant in discharging duties which the employer cannot be expected to discharge personally. *There is no reason why a third person, with whom there is no such implied understanding, should be entitled to immunity from the results of the negligence of his servants, merely because the injured person is also an employe who in the course of his employment is compelled to come in contact with the servants of such third person.*"
>
> 12 Am. & Eng. Ency. of Law, 993.
> McKinley on Fellow Servants, 114.

Even under the rule recognized by the Pennsylvania Courts, individuals in order to be fellow servants must be in the employment of the same master and engaged in a common enterprise. But how can the exemption from liability of a master for the negligence of his servant be made applicable to one who is not in fact a fellow servant with the negligent one; who is not in the employ of the master; who has no control over any of the company's operations and who is not under the control of the company? None of the reasons which avoid liability in the case of fellow servants is present where the injured party is not a servant of the common mas-

ter, and especially so, when, as in the case of the railway postal clerk, who is in a place furnished by the railroad company for him, and for which the railroad company receives a liberal compensation.

It should also be observed that this exemption of liability, contrary to the principles of the fellow servant law, is given to the *railroad companies only* of said State and that all other employers carrying on business in that state,—whether they be common carriers, other than railroad companies, or whether they be engaged in the most dangerous of all present-day employments (that of manufacturing iron and steel, and powder and dynamite), or any other dangerous employment,—are subject to the same liabilities for the acts of their servants as has been the law since the adoption of the fellow servant rule.

Clearly there is no reason why the principle of *respondeat superior* should be abrogated by this statute as against a railway postal clerk on the ground that "the relation he assumes is one of danger."

Even if it were conceded that the railway postal clerk assumed the risk which resulted from a *train of cars moving rapidly from one point to another,* that assumption of risk is wholly different from assuming the risks arising from the *negligent operation of the road by the servants of the deefndant.* The latter risk the railway postal clerk, not being an employe of the railroad company, does not, and under no principle of law can be held to, assume as a risk incident to his employment.

Pennsylvania Co. vs. *Woodworth,* 26 O. S. 585.

> "If there be necessarily more danger in traveling in the coach prepared and used for transportation of the mail even when due care is used, than in traveling in the coaches prepared and used for transportation of ordinary passengers, then it may be held that a mail agent assumes the risk of the danger necessarily thus arising from the position of the mail car in the train; *but he does not assume any risk of danger that may result from the negligence of the carrier or its servants."*

Railway Co. vs. *Wilson,* (Texas), 11 L. R. A. 486-487.

"The contract by virtue of which he became entitled to transportation was made in reference to his transportation in that car, and, if appellant or its servants failed to use that degree of care prescribed by the charge of the Court for his safety, then appellant was liable."

Railway Co. vs. *Wilson, supra,* 487.

"The foundation of the rule of the protection of a passenger is the undertaking of the common carrier, which is to safely carry; *but another reason for it is that, when the passenger commits himself to the carrier, he does so in ignorance of the machinery and appliances, as well as their defects, used in connection with the means of transportation, and becomes a passive and helpless creature in the hands of the transportation company and its agents.*"

Fox vs. *City of Philadelphia,* 208 Pa. St. 127.

By the opinion of the Court—still referring to the case of *Kerby* vs .*Railway Company*—one lawfully engaged or employed on or about the premises of a railway company, but not in the employ of said company, is bound to assume the risks of the dangers arising from the negligence of employes of said company, no matter whether he be working shoulder to shoulder with them or whether they have never been seen by him. Under that holding he is deprived of his right to recover whether the negligent act be that of a brakeman or engineer on his own train or whether it be that of a trainman on another train, a section man on a section of the road over which they happen to be running, or a telegraph operator, whom he has never seen, *who carelessly fails* to deliver a message to the operatives of his train. If the railway postal clerk can thus be deprived of his rights as a passenger and made a fellow servant of the railroad company on the ground that he happens to be "engaged or employed," in distributing and protecting his employer's mail, on one of the company's trains, then the soldier "engaged or employed" in guarding

the government's impedimenta; the nurse "engaged or employed" in attending her master's children; and the stenographer "engaged or employed" in taking the dictation of his busy employer en route in Pullman car, can each and all for the same reason be denied their rights as passengers and made fellow servants of the railroad company in whose train their employers' interests at the time compel them to be.

The rule as thus announced by the Court is not based on law or reason and has not been followed by the later decisions of the same Court. For the purpose of sustaining this statement the case of *Keck* vs. *Railroad Company*, 206 Pa. St. 501, is hereby referred to. The first syllabus is as follows:

> "Independently of the act of April 4, 1868, P. L. 58, the railroad company was liable to the employes of another railroad company for negligence, just as to any other stranger, the general similarity of the aims of duties not being sufficient to bring them within the rule as to the risks of a common employment. The general effect of the act was to make three classes of persons, employes, quasi employes under the act, and strangers."

The third syllabus of the case is as follows:

> "To bring a case within the second class distinguished in *Spisak* vs *B.& O. R. R. Co.*, 152 Pa. St. 281, viz., those where the employment is ordinarily the duty of railroad employes, the plaintiff must not only be engaged in such work but must also be so engaged for or upon the property of the railroad by whose negligence he is injured."

It is apparent from the holding in this case that it is essential that the non-employe be, not only engaged or employed upon the property of the railroad company by whose negligence he is injured, *but also that he must be engaged in an employment which is ordinarily the duty of railroad employes.*

But in what particular can it be claimed that the statute has any "real or substantial relation to the objects claimed for it" as stated in the opinion of the Court in the *Kerby*

case? It is contended that the statute provides in effect a penalty on a non-employe for entering into an employment which is regarded dangerous and that the penalty shall be imposed on him, not by reason of any act of negligence on *his* part, but for the negligence of the servants of the railroad company, which company, for a compensation to it paid, agrees he shall be there. The penalty so imposed is taking away from him, a non-employe, the right which he theretofore possessed to recover from the master of the employes, for injuries sustained by reason of the negligence of such employes. This is accomplished by providing that "the legal principal of *respondeat superior* shall have no place in this particular relation." Because "the relation he" (the non-employe) "assumes is one of danger, and the fact of danger authorizes the regulation by the state, as the conservator of the lives, security and property of her citizens." But to be on a train of a railroad company as a railway postal clerk is a legal relation authorized by acts of Congress, and a relation which is recognized and assented to by the railroad company by the terms of its contract with the Federal Government. Should not the railroad company, which agrees for a compensation to carry said clerk in that relation, assume some of the dangers of the relation, particularly those which result directly from the negligence of itself and its employes?

The holding in the *Kerby* case is not only unjust, but is unsupported by either authority or principle.

2. Review of Railroad Company vs. Price.

But in the case of *Railroad Company* vs. *Price*, 96 Pa. St. 256, relied on by defendant in error herein, the Court bases its conclusion, that the statute properly included the railway postal clerk within its operation, on the ground by it stated on page 266, that "He is not bound to observe any of the rules prescribed for the protection of passengers. He may expose his life in the most reckless manner."

It was unnecessary for the court to attempt to defend the statute on the ground of the recklessness of the railway postal clerk. If he were injured by reason of his own negligence, *of course* he could not recover, with or without the provisions of the statute. The object of the statute was to

provide that he could not recover for the negligence of *others*, to-wit: the employes of the railroad company. Nor does the fact that the railroad company has no control over the railway postal clerk have any saving effect on the validity of this statute. No case can be found where the non-control of the railroad company over the railway postal clerk in any way tended to produce the injury. The accident *always* happens by some negligent act of the railway company or its employes and the fact that the railway postal clerk is independent of the orders of the railroad company, while he is in the postal car, cannot *reasonably* be considered as having anything to do with the cause of the accident, and, therefore, would be no reason on which to base a justification of this statute.

Again, it is said by the court in the *Price* case "no good reason can be shown why the non-employes should have higher rights than the employes." It might have occurred to the Court, on reflection, that the same reason which compelled the conclusion of the judges who constituted that bench, prior to the enactment of the statute, *in the Henderson* and *Lockhart* cases, *supra,* would be a sufficient reason why the rights of non-employes should be different from those of employes of the company. In the one instance the non-employes are on the trains with a consideration moving to the company so carrying them to be protected by said company and its employes from negligent acts on their part, and there is no assumption, either express or implied, of risk of danger of such acts on the part of said non-employes. In the other instance, the employe by his contract of employment agrees to assume the ordinary risks of such employment including the negligent acts of his fellow servants.

Again, the example referred to by the court, on page 267 in the *Price* case, to illustrate its contention that "Those persons who, by the accident of their position, happen to be employed on the trains, may recover for injuries, while others, equally deserving, who do not ride with the trains, but are 'employed or engaged in or about the roads, works, depots and premises of the company,' have no such right," is a discrimination in favor of the non-employes, is as unfair and irrelevant to the real question under consideration, as an illus-

tration, as is the contention stated by the court. The illustration referred to is as follows:

> "Suppose the deceased, instead of being employed as mail agent, had been employed by the government to carry the mail from the depot to the post-office, and while so engaged about the depot had been killed by the negligence of the defendant's srvants. In such case he would have been clearly within the act and not within its exception. Can the mere fact that he was upon the train instead of being about the depot make any difference?"

Even if the first contention with reference to the mail carrier be true, it is wholly inapplicable to the contention with reference to the railway postal clerk; although it, in itself, is a good example of the unconscionable operation of the statute. But as to the railway postal clerk, the Court sublimely ignores the fact that in the latter case there is a compensation paid to the railway company for carrying him as a passenger, while in the case of the person at the depot getting the mail, no relation of carrier and passenger exists, or could be claimed to exist.

The illustration, and the argument based thereon by the Court, is on the same plane of fairness as is the statement made by it in the same opinion that a railway postal clerk is not a passenger in contemplation of the terms of the statute; *disregarding the fact that the legislature must have had in mind, at the time that it made the exception of passengers in the act, that the Supreme Court of that state had held a person who was not a servant of the railroad company, and who was in charge of property being conveyed with himself by the railroad company for his employer, must be considered in the light of a passenger.*

> *Lockhart* vs. *Lichtenthaler*, 46 Pa. St. 151-159.

> "When particular words and phrases have in law acquired a fixed signification and are thus incorporated into a statute, the legal presumption is that the legislature must use them in this legal sense."

> 26 Ency. of Law, 607.

If it had really been the intention of the legislature to include railway postal clerks and others of similar occupation in the limitation of the railroad company's liability one would certainly have expected to find that intention declared in plain and unambiguous language.

It is submitted that the reasons given by the court both in the *Kerby* and *Price* cases, are not sufficient, to one approaching the inquiry with an unbiased mind, to save the statute from being in conflict with the provisions of that safeguard of individual rights which controls all legislative enactmnets, be they Federal, State or Municipal, to-wit, *the Constitution of the United States.*

Can it be held that the considerations which form the basis of the conclusion of the Court of Last Resort of the State of Pennsylvania in construing the statute under consideration, holding in the *Price* case that a railway postal clerk has only the rights of an employe of the company carrying him, and, in the *Kerby* case, that the statute is not in contravention of constitutional rights, are sufficient to overcome, on the ground of police regulation, the rule founded, *"deep in public policy"* as has often been announced by the Supreme Court of the United States, that a common carrier owes the duty to exercise the highest degree of care to those whom it carries for hire? If it can be, then on the same considerations a statute depriving *all* passengers of their right to recover for the negligence of railroad companies and their servants must be held to be equally constitutional. If it can be, then form, and not substance, shall be the test in the determination of constitutional rights.

The *real* purpose of the statute was, as we have heretofore seen, to relieve the railroad companies of the state of Pennsylvania from the burden of paying damages to those injured or killed by reason of the negligence of said railroad company's employes; said railroad companies having found the burden growing out of the payment of said damages too great.

Wherein does this provision tend towards the preservation of the life, health, morals or welfare of the community? Surely it does not effect, nor tend to effect, that result with reference to the class of railway postal clerks, who are directly injured thereby, for it would hardly be contended—if fairness

is to be a consideration in applying the constitutional test to this statute—that depriving an individual of his right, or cause of action to recover for an injury sustained by him by reason of the negligence of another, will in no manner cause the tort feasor to correct, or to attempt to obviate, the negligence.

It has been the universal remedy elsewhere, when such result was *honestly* sought to be obtained, to *add* a cause of action to those theretofore existing in favor of the person injured by reason of such negligence, instead of taking one from him.

The proposition may be thus stated: The legislature of Pennsylvania says to the class of railway postal clerks "your position on the train is a dangerous one; you have no control over said train nor have the train operatives control over you; in order that the lives, health, morals and welfare of yourself, or of the commonwealth, may be preserved we will take from you your right to recover from the company—on whose road the Federal Government has paid your fare—for any negligence suffered by you by reason of the operatives of said train, or of any other person, except for such as an employe of said company can recover; and by so depriving you of such right the beneficent ends referred to will be effected." The proposition when thus stated carries with it the condemnation of the statute.

How this statute—even though it be held to have been enacted to protect the public health, the public morals, or the public safety—has any real or substantial relation to those objects, requires a power of discernment which is not given to mortals making their examination through the medium of fairness.

The language used by this court in the recent case of *Lochner* vs. *New York, supra*, on page 64 is peculiarly apposite to the statute herein under consideration:

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the charac-

ter of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the thing implied; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation and not from their particular purpose."

Lochner vs. *New York*, 198 U. S. 45-64.

"A state whose legislation has been notoriously corrupted by railroad influences, at the most corrupt period of its legislation, disfigured its statute book with the following law: 'If any person shall sustain personal injury or loss of life, while lawfully engaged or employed on or about the road, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action to recover in all such cases against the company shall be such only as would exist if such person were an employe; provided, that this section shall not apply to passengers.' The purpose of this law is seen at a glance. By a rule interpolated upon the common law by judicial legislation within the last 40 years, a servant cannot recover damages of his master for an injury which happens to him through the negligence of a fellow servant engaged in the same common employment. Now, the object and effect of the above statute was to extend this rule to the cases of *all persons* who may happen to be laboring or engaged about the premises, or upon the trains of railroad companies, except those who are passengers; so that any person, not a passenger, who may be compelled to place himself in such a situation, must accept all risks of the negligence of the pecuniarily irresponsible persons who are employed by railroad companies, without any recourse in damages against the companies themselves, other than the limited re-

course which an employe would have under like circumstances. Such a law could not have been passed except as the result of direct or indirect purchase. There is not a state in the Union in which such a law submitted to the popular vote, would not be rejected by an overwhelming majority. Its very existence implies a breach of a public trust upon the part of the representative of the people by whose votes it was enenacted. That it has found judicial apologists is not creditable to the jurisprudence of Pennsylvania. A learned judge of the supreme court of that state has found '*strict justice*' in it. Its constitutionality was affirmed by the supreme court of that state as soon as it was assailed."

Waterbury vs. Railroad Co., 17 Fed. Rep. 671-682. (Note by Reporter Thompson, Text Book author.)

CONCLUSION.

The statute is not only in conflict with the rule of *public policy*, as often announced by Courts of last resort—including that of the State of Pennsylvania—but also lacks any of the essential elements which are necessary to bring it within the operation of the doctrine of *police regulation;* for it has no relation to such matters. The interest of the public generally, as distinguished from those of a particular class, do not require such inference; and the means are not reasonably necessary for the accomplishment of the pretended purpose, and are unduly oppressive upon, at least, the plaintiff in error herein and the class of which he is one.

This case is, therefore, submitted to the consideration of this Court with the deep conviction of counsel that the plaintiff in error has by virtue of the act of 1868 been deprived of rights for which he is entitled to recover both in law and justice, and

that the state statute which stands in his way of recovery, being clearly in contravention of those provisions of the Federal Constitution hereinbefore discussed, should be declared to be invalid.

Respectfully submitted,

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Attorney for Plaintiff in Error.

ROBERT B. MURRAY,
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Of Counsel.

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IN THE

Supreme Court of the United States

No. 19,823

REUBEN L. MARTIN,

Plaintiff in Error

VS.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,

Defendant in Error

REPLY BRIEF IN BEHALF OF PLAINTIFF IN ERROR

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of Counsel.

The Vindicator Press, Youngstown, O.

In the Supreme Court of the United States

REUBEN L. MARTIN, *Plaintiff in Error,* vs. THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, *Defendant in Error.*	REPLY BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

ARGUMENT.

In reply to the argument of defendant in error, filed herein, the following contentious are submitted on behalf of the plaintiff in error:

FIRST. AS TO THE ARGUMENT THAT THE ACT OF APRIL 4, 1868, SHOULD NOT BE DISTURBED AT THIS TIME ON ACCOUNT OF ITS AGE.

It is contended by defendant in error in various parts of its brief that because the statute, the constitutionality of which is herein attacked, has been permited to stand for 35 years that i is now too late to successfully attack it on the grounds relied on in the case at bar.

To this contention the plaintiff in error replies:

(a) Because the railroad companies of the State of Pennsylvania have enjoyed for 35 years, under an unconstitutional provision of the statute, exemption from liability for acts of negligence for which they should have paid, is no reason why the unlawful privilege should be made perpetual on account of age or the fact that question of its constitutionality was never before properly brought before this court for its determination.

(b) The railroad companies have not changed their position nor have property rights been affected, in a manner of which said companies could be heard to complain, by reason of

the long standing of the statute. If they have been relieved from paying vast sums of money by reason of the continued operation of an unconstitutional statute that might be a subject for congratulation but would hardly be a tenable position of defense. No statute can be too old to be repealed or amended by legislative enactment; and no one, provided no constitutional rights are infringed, can be heard to complain by reason of such change. If privileges having their inception in statutory provisions can be changed by the legislature without giving ground of complaint to those enjoying said privileges, surely no objection can be made by them because they are deprived of such privileges when a court finds that they rested on an unconstitutional basis and unlawfully deprived others of rights guaranteed to them by the Federal constitution. It is with poor grace that they seek protection behind its age.

(c) If no citizen of Pennsylvania has seen fit to challenge the constitutionality of the Act, under the Federal constitution, *that* is no reason why a citizen of another state cannot so make the challenge when the act is invoked to defeat his rights and deprive him of that which otherwise would belong to him; and this, no matter how old the statute may be, nor how many others have been theretofore deprived of their constitutional rights thereby.

(d) The plaintiff in the case at bar was not a citizen of the State of Pennsylvania, but of the State of Ohio, and no cause of action had accrued to him prior to the one herein claimed, and this statute had never before been interposed as a defense to a claim by him made. The doctrine of laches cannot be invoked against him.

(e) The constitutionality of the statute has never been passed upon by the court of last resort of Pennsylvania on the grounds relied on herein. Only the constitution of the State of Pennsylvania was considered by the court in deciding the case of *Kerby* vs. *Railroad Company*, 76 Pa. St. 506, relied on by defendant in error to sustain the constitutionality of this statute.

It can hardly be held as contended by defendant herein, that the holding of the Supreme Court of Pennsylvania in that case would preclude this court from determining the question as to whether or not the act under consideration is in violation

of the Federal constitution because the part of the state constitution therein considered was in some respects similar to that of the Federal constitution herein under consideration. If it would be, then the court of last resort of a state could foreclose the consideration of a Federal constitutional question by this court by holding that the act in question did not contravene the provisions of its own constitution of similar purport to that of the Federal constitution.

It was held by the Supreme Court of the United States in the case of *Miller* vs. *Railroad Company*, 168 U. S. 131, that the only constitutional question raised by the plaintiff in that case was that arising out of the State, and not the Federal, Constitutional provisions; and for that reason this court declined to consider the case and dismissed it.

No constitutional question was raised in the case of *Railroad Company* vs. *Price*, either in the State or Federal Court. There is nothing in the opinion of the Supreme Court of the United States, 113 U. S. 218, which can by any means be construed to hold anything else than that there was no Federal question raised in the case by reason of Revised Statutes of the United States Sec. 4000 and the Act of March 3, 1865, as it came into that court from the Supreme Court of Pnensylvania. The claim made by counsel representing the plaintiff in error in that case was that there was a Federal question involved in that the decedent, Price, was a passenger, under and by virtue of, Sec. 4000 of the Revised Statutes of the United States. The court held with reference to this:

> "We do not think these provisions either aid or govern the construction of the proviso in the Pennsylvania statute."

Inasmuch as that was the only ground by which the Supreme Court of the United States was asked to take jurisdiction of said case it was necessarily dismissed.

SECOND. AS TO THE CONTENTION THAT UNDER THE LAW OF THE STATE OF PENNSYLVANIA A POSTAL CLERK WAS NOT A PASSENGER PRIOR TO THE ENACTMENT OF THE STATUTE AND, THEREFORE, WAS NOT DISCRIMINATED AGAINST BY REASON OF ITS ENFORCEMENT.

It is contended by the defendant in error that a railway postal clerk would have no rights as a passenger in the State of Pennsylvania if the Act of April 4, 1868, had never existed; that by the common law of that State such postal clerk had no rights; and that the different relationshp in which he stands to railroad companies carrying him in the State of Pennsylvania from those carrying him in other states is simply a result of a difference in the common law of the State of Pennsylvania from that as it existed in the other states of the Union. To support this contention no authorities are cited.

In addition to what has been said by plaintiff in error on this subject on pages 9 to 20 of its opening brief herein the following is submitted:

A reference to the case of Railroad Company vs. Price, 96 Pa. St. 256, relied upon by defendant in error to establish its defense that a railway mail clerk is not a passenger within the terms of the statute, discloses that it is the case in which the Supreme Court of Pennsylvania has given the contsruction to the act, the constitutionality of which is in this case challenged, and that its holding therein is that *under the terms of said statute* a railway postal clerk is not a passenger, and does not have the rights of such, notwithstanding the fact that prior to the enactment of said statute he had the right to recover for the negligence of the employes of the carrier so transporting him. The language of said court on this subject is as follows:

> "This class" (referring to the new class created by the statute from which the right to recover was taken by the terms of said statute) "prior to the act of 1868, were entitled, under the decision in *Cattawissa Railroad Company* vs. *Armstrong, supra,* to from negligence of the employe."

In a recent case decided by Judge Archbald, United States District Judge of the Middle District of Pennsylvania, the fact herein contended for is established.

> *"By reason of the local Pennsylvania act of April 4, 1868,* (P. L. 58), *as construed in Railroad v. Price,* 96 Pa. 256, although contrary to the great weight of authority elsewhere, a railway mail clerk is not a passenger, and according to the provisions of the statute, in case of personal injury while engaged in the performance of his duties on or about the road, works, depots or premises of a railroad, or any train or car thereon, can only recover of such company the same as one of its employes."

Yarrington vs. *Delaware & Hudson Co.*, 143 Fed. Rep. 565.

A reference to the case just referred to discloses the fact that the judge writing said opinion was not only loath to follow the construction placed upon said statute by the court of last resort of said State, but was greatly impresesd with the harshness of its operative effect. In that case, it should be observed, no constitutional question was apparently raised, none was, at least, referred to in the opinion. It should also be observed that the postal clerk who was the plaintiff in said case did not have an interstate run, but his duties were confined to the State of Pennsylvania solely. The language used by the court in passing upon the case points strongly to the fact that had the plaintiff's duties taken him between two or more states a different conclusion on this proposition would have resulted. The language referred to is in part as follows, (p. 569):

> "Not only, as it seems to me, does it contain several doubtful assumptions involving more than one non sequitur, but it stands absolutely alone, being opposed to the overwhelming weight of authority to the contrary. *As the consequence of this, moreover, we have the anomalous result that whenever a railway mail clerk is carried into or through Pennsylvania, on an interstate run, his status changes as he crosses the state line, being accorded the rights of a passenger for one part of his journey, and not the rest of it, unless, perchance, the interstate character of it should be held to interfere."*

It is submitted with confidence, however, that, in addition to the foregoing the cases of *Railroad Company* vs. *Henderson*, 51 Pa. St. 315, and of *Lockhart* vs. *Lichtenthaler*, 46 Pa. St. 151, are determinative of what the rights of the railway postal clerk were prior to the enactment of said statute, and that, in absence of said statute, such railway postal clerk would have the same rights as a passenger to recover for the negilgent acts of the carrier or its employes.

THIRD. AS TO THE CONTENTION THAT THE STATUTE DOES NOT REGULATE INTERSTATE COMMERCE.

Many of the cases cited by the defendant in error in support of the contention that the classification made in the Pennsylvania act is not unconstitutional are cases in which the party raising the question is a corporation and the court, sustaining the constitutionality of the statute, bases its reason on the ground that the legislature—which has power in advance to determine what rights, privileges and duties it will give to, and impose upon, a corporation which it has created—has, under the generally reserved right to alter, amend, and repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation.

The case of *Gladson* vs. *Minn.* 166 U. S. 427, cited by defendant in error, to sustain its contention that an act of a state legislature compelling interstate mail trains to stop at county seats is not in contravention of the interstate commerce clause, must be examined in the light of the facts stated in the opinion that it affected only trains running within the State, and that the statute then under consideration expressly provided that "this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad."

When interstate mail trains are affected by such statute it has been held to be void as coming within the operation of the clause.

> "A statute of the state which unnecessarily interferes with the speedy and unniterrupted carriage of the mails of the United States, cannot be considered as a police regulation."
>
> *Railroad Co.* vs. *Illinois*, 163. U. S. 142.-154.

FOURTH. AS TO THE CONTENTION THAT BECAUSE IT HAS BEEN HELD THAT A STATE MAY ENLARGE THE LIABILITY OF A MASTER FOR THE NEGLIGENCE OF A SERVANT IT SHOULD FOLLOW THAT THE CONVERSE OF THE PROPOSITION IS TRUE.

It is contended by defendant in error that because it has been held that a state may enlarge the liability of a master for the negligence of a servant it should follow that the converse of the proposition is true and that a state may diminish by statute the employer's liability. If the conclusion of the courts to the effect that state statutes imposing on railroad companies civil liability to their employes for the negligence of fellow servants be based, as it is in *Tullis* vs. *Railroad Company*, 175 U. S. 348, and cases therein cited, on the ground "that the hazardous character of the business of operating a railway would seem to call for special legislation in respect to railroad corporations *having for its object the protection of their employes as well as the safety of the public*," it could not be contended that a statute, which by its terms exempted the railroad companies from liability not only to its employes but also to certain classes, not their employes, and which were being conveyed by them for hire, would for the same reason be a valid provision. The holding must be based on the theory that the railroad company has the power and right to govern its employes, in the performance of their duties, by the promulgation and enforcement of proper rules, and if such rules be not observed by such employes that the master can discharge the same, and that the imposition of additional liability tends to the exercise of greater care on the part of the railroad companies in this respect.

Railroad Co. vs. *Curran*, 19 O. S. 365.

Jacobson vs. *R. R. Co.*, 20 Minn. 125.

If the *imposition* of such liability be valid as relating to employes, for the reason stated, those reasons cannot be relied on to support *exemption* from liability to non-employes. It being established that the exigencies of the character of the business justified the imposition of additional liability on the railroad company, it must follow that the same conditions must make a statute creating the exemption from liability to the classes referred to, especially obnoxious and invalid. *The same reason cannot support the two kinds of statutes.*

FIFTH. AS TO THE CONTENTION THAT PLAINTIFF ASSUMED THE DEPRIVATION RIGHT CREATED BY THE STATUTE.

But it is claimed by defendant in error that the plaintiff was obliged to know that while in the state of Pennsylvania he had none of the rights of a passenger, whatever his rights may have been in other states. The contention of defendant in error is based on the assumption, that because the statute in a state into which the interstate business of plaintiff in error required him to go, which deprives him of rights which are enjoyed elsewhere, that by going into said state he accepts and agrees to all the burdens placed upon him by said statute, no matter how contrary to the constitution they may be.

The contention carries with it its own condemnation. If it were tenable, then by remaining in a state the individual aggrieved and oppressed by the operation of the statute would be estopped from challenging its constitutionality. His only recourse would be to remove to some other state. If any presumption is to obtain as to the knowledge of this plaintiff, a non-resident and non-citizen of the state of Pennsylvania, it is that although there existed a statute in Pennsylvania which deprived him of his right to recover for the negligence of the employes of a railway company on the train of which he was traveling, he had the right, if the occasion ever arose, to test the validity of that statute by the limitations which are prescribed by the Federal Constitution. Whatever may be said as to the right to take away the rights of an employe in favor of his employer, by statutory enactment, cannot be in any manner controlling as to the right to change the status of a non-employe or a passenger or a passenger to that of an employe, as we have heretofore seen. The contention of defendant in error on this subject again is dependant on the assumption that a railway postal clerk did not have the rights of a passenger prior to the enactment of the statute. His assumption failing the contention based thereon falls with it.

This is not a case of a servant contracting for service with a master whose business requires his employes to go into two or more states; in such case the servant *agrees* by his contract

of service with the master to be subject to the laws of the states in which said service is to be performed. In the case at bar the contract of the plaintiff was with the Federal Government and under a statute of the United States (Sec. 4000-4005) which provided for his transportation on railroads over which the duties of his employment would take him, and that a compensation would be paid by his employer to said railroad company for said transportation; and thereby he was *in fact* a passenger, and in all other jurisdictions, including the Federal, was in *law*, a passenger. Because a state statute changes his status to that of an employe, *not of the Federal Government*, but of the railroad company, could hardly be contended, much less held, to make him, by implication, or in fact, *agree* to such change, as between himself and the railroad company. The waiver of the right could not be effected even by an express agreement. It surely cannot be done by a legislative enactment.

> "While a valid statute regulating contracts is, by its own force, read into, and made a part of such contracts, it is otherwise as to invalid statutes."
>
> *Palmer* vs. *Tingle*, 55 O. S. 423.
>
> *City of Cleveland* vs. *Construction Co.*, 67 O. S. 197.

But it has been held, and properly, that the right of a railway postal clerk to recover for injuries sustained by reason of the negligence of the carrier or its servants cannot be waived.

Seyholt vs. Railroad Co. 95 N. Y. 562-571-572-574.

SIXTH. AS TO THE CONTENTION THAT THE FOURTEENTH AMENDMENT CANNOT BE HELD TO RENDER THE STATUTE INOPERATIVE FOR THE REASON THAT THE STATUTE WAS IN EXISTENCE AT THE TIME THE FOURTEENTH AMENDMENT BECAME OPERATIVE.

It is suggested by defendant in error on page 19 of its brief, that because the statute herein under consideration was passed in 1868, prior to the passage of the Fourteenth Amendment, that it cannot be affected or controlled by the provisions

of said amendment. This contention is disposed of by a case decided by this court wherein it is held, with reference to the Fifteenth Amendment, as follows:

> "The adoption of the Fifteenth Amendment rendered inoperative a provision of the then existing constitution of a state whereby the right of sufferage was limited to the white race."
>
> *Neal* vs. *Delaware*, 103 U. S. 370.

Respectfully submitted,

Charles Rooney Jr.

Attorney for Plaintiff in Error.

ROBERT B. MURRAY,
WILLIAM S. ANDERSON,
Of Counsel.

IN THE

Supreme Court of the United States

REUBEN L. MARTIN,

Plaintiff in Error,

VS.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,

Defendant in Error.

ARGUMENT ON BEHALF OF THE DEFENDANT IN ERROR.

Statement.

The circumstances out of which this litigation arose and the legal questions involved are so fully stated in the stipulation of Counsel (p. 26 to 28 of the Record) and so fairly set forth in the argument made on behalf of the Plaintiff in Error (pp. 1 to 4) that they require no extended restatement.

The Defendant Railroad Company had contracted with the United States Government to carry the mail in a mail car

provided for that purpose and by virtue of its contract became obligated to "carry the person in charge of the same;" this by virtue of Sec. 4000 Revised Statutes of the United States. Plaintiff had been assigned by the Government to take charge of the mail between Cleveland and Pittsburg. His duties were to work on the mail car and to distribute the mail in bags at intermediate stations and also at Cleveland and Pittsburg. On one of his trips from Pittsburg towards Cleveland and while within the State of Pennsylvania, the train was derailed at a switch negligently left open by a brakeman, and the Plaintiff was to some extent injured. The Common Pleas and Circuit Courts and the Supreme Court of Ohio, under the authority of The Pittsburg & Lake Erie Railroad Company against Bishop, 7 Circuit Decisions p. 73, Railroad against Price, 96 Pa. State p. 264, and Price against the Railroad Company, 113 U. S. p. 218, held that the rights and liabilities of the respective parties were to be governed and determined by the law of the State of Pennsylvania; and that under the statutory law of that state of April 4, 1868, Plaintiff was "lawfully engaged or employed upon a car of the Railroad Company, of which Company he was not an employee," *that he was not a passenger*, and that his rights were such only as they would have been if he had been an employe of the Railroad Company. It further appearing to the Court from the decisions of the State of Pennsylvania pleaded in the answer and introduced in evidence, (see p. 30 of the Record) that if he had been employed by the Railroad Company and injured under like circumstances by the negligence of the brakeman, he could not have recovered, judgment was rendered for the Defendant Company.

The Statute of the State of Pennsylvania which to-

FILE COPY.

No. 66.

IN THE

Supreme Court of the United States

No. 19823.

Office Supreme Court U. S.
FILED
OCT 2 1906
JAMES H. McKENNEY,
Clerk.

REUBEN L. MARTIN,

Plaintiff in Error,

vs.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

James P. Wilson,
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Attorneys for Defendant in Error.

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gether with adjudicated cases, rules this case, reads as follows:

> "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a Railroad Company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee; provided that this section shall not apply to passengers."

Argument.

It will be conceded, therefore, that this case was properly decided in favor of the defendant Railroad Company, by the Common Pleas, the Circuit and the Supreme Court of the State of Ohio, unless the statute of Pennsylvania, quoted above, is invalid upon one or more of the grounds upon which it is alleged to infringe the Federal Constitution, its validity having been upheld in all of the Ohio Courts.

If we have fully comprehended the able argument of plaintiff's counsel, it seems to proceed upon the theory that under the law of Pennsylvania, as it existed prior to 1868 —the year of the enactment of the statute—a postal clerk, working for the government in a mail car, while the train was passing through the State of Pennsylvania, sustained the legal relation to the Railroad Company, of passenger and carrier; that prior to the statute, if he had been hurt under the circumstances existing in this case, he would have been entitled to recover damages for the injury inflicted; that the effect of the statute was to change the relation of passenger which he sustained to the Railraod Company and to limit his right to recover damages, to such right as he

would have had, if he had been an employee of the Company, and that such being the practical, operative effect of the statute, it was unconstitutional in that it,

FIRST. Attempts to regulate commerce among the several states.

SECOND. Interferes with the right of Congress to to establish post-roads.

THIRD. It deprives plaintiff of property, without due process of law.

FOURTH. Abridges his privileges and immunities as a citizen.

FIFTH. It denies to him as a postal clerk in the State of Pennsylvania, the equal protection of the laws.

While we do not consider it to be material in the consideration of these questions to determine what the technical legal relation was which Martin would have sustained to the Railroad Company, in the State of Pennsylvania and under its laws, if no such statute had been enacted, yet, as the whole stress and force of the argument of the plaintiff's counsel is based upon the assumption, that but for the statute, Martin would have had the rights of a passenger in Pennsylvania, it will not be amiss to consider briefly the ground of this contention.

A. Under the law of the State of Pennsylvania, the plaintiff did not sustain the relation of passenger to the defendant, either prior to or subsequent to the passage of the statute.

We had supposed this point had been settled for us beyond all controversy, by the Supreme Court of Pennsylvania, in the case of the Pennsylvania Railroad Company versus Price, reported in 96 Pennsylvania State Reports, page 256; wherein it is distinctly held that a postal clerk in the employ of the government while working in a mail car, running

through the State of Pennsylvania, *is not a passenger*, and the syllabus of the case is as follows:

> "The Act of April 4th, 1868, provides, 'That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on, or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action in all such cases against the company shall be only such as would exist if such person were an employee, provided this section shall not apply to passengers.' *Held*, that a route or mail agent in the employ of the United States Post Office Department, while traveling on a railroad in the performance of his duties, *is not a passenger within the meaning of the act.*"

In that case, Price, a postal clerk, was injured in the State of Pennsylvania, by a collision between a mail train on which he was working and another train. In his action against the Railroad Company the statute was interposed as a defence. To avoid the effect of the statute, it was the contention of Price, that he was a passenger, entitled to all the rights of a passenger, and therefore was expressly excluded from the provisions of that act, by the last clause which reads as follows:

> "Provided this section shall not apply to passengers."

It will therefore be seen that the precise question presented to that Pennsylvania Court, was whether Price was or was not a passenger within the State of Pennsylvania. If he was, then the Act did not apply to him; if he was not, then being in the employ of a third person, and working upon the railroad train, the Act did apply. The court determined conclusively that he *was not a passenger* and furthermore, goes on to give the reasons *why* he was not a

passenger. Thus, on page 266 of the opinion, the court says:

> "It was urged that the deceased was a passenger, because, under the Act of Congress, Section 4,000, 'Every railway company carrying the mail shall carry on any train which shall run over its road, and without extra charge therefore, all mailable matter directed to be carried thereon, with the person in charge of the same.' "This Act makes it the duty of the Company to carry the mail Agent without extra charge, *but it no more makes him a passenger than it does the mail matter of which he has the care.* The Company have no control of him, as they have over passengers for whose safety they are responsible. He is not bound to observe any of the rules prescribed for the protection of passengers. He may expose his life in the most reckless manner. The mail-car like the baggage-car is in a known place of danger. From its position, it is peculiarly exposed to destruction in case of collision."

The court then goes on to distinguish the line of cases cited by counsel in their argument, from the case cited, particularly the Henderson case, so much relied upon. We are aware that the courts of other states and that the Federal Courts have reached a different conclusion, but with their conclusions, we are not at present concerned.

The Price case above cited went to the Supreme Court of the United States and the decision in that Court (113 U. S. p. 218) affirming the Supreme Court of Pennsylvania, throws much light upon this subject, the Court holding that the fact that the injured person was a postal clerk and that he was being carried, together with the mails, under a contract made with the Government, no more affected the question of whether he was a passenger than if he had been in charge of so much freight and employed by some third person.

See language of the Court on page 222.

> "The Statutes of the United States which authorize and direct this service did not therefore make the person so employed a passenger nor deprive him of that character in construing the Pennsylvania Statute, nor does it give the person so employed any right as against the Railroad Company, which would not belong to another person in a similar employment, by others than the United States."

It thus appears that while under the common law as announced in some states a postal clerk traveling in charge of the mails is regarded as a passenger, (see cases cited by Plaintiff's Counsel) yet that fact is entirely immaterial and has not in any degree influenced the judgment of the United States Supreme Court in enforcing the common law of the State of Pennsylvania.

In this connection it should be said that the Statute of Pennsylvania, April 4th, 1868, the constitutionality of which is attacked in this case, *in no manner bears upon or affects the entirely independent question of whether or not the Plaintiff was a passenger in the State of Pennsylvania.* The question whether a postal clerk was or was not a passenger turns upon widely different considerations entirely apart from the Statute, and it must be apparent from the cases cited, that the Plaintiff would have no rights as a passenger in the State of Pennsylvania, if the Statute under consideration had never existed; so that it is not a sound contention as urged by Counsel for Plaintiff, that the relation of passenger which he sustained in Ohio was taken away or abrogated by this Statute of Pennsylvania. The different relationship in which he stands to the Defendant Company in Pennsylvania is simply the result of a difference in the common law of the two states.

We think, therefore, that this court must conclude, that

the argument for plaintiff, based upon the assumption that the plaintiff was deprived of his rights as a passenger, by reason of this statute, is untenable, and so far as that argument is urged to illustrate the invalidity of this Pennsylvania statute, it is without weight.

If we were to assume, however, for the mere sake of the argument, what is not true in fact, that the statute deprived him of the legal remedies of a passenger and limited him to the rights of an employee of the Company, yet we can not assent, even under that assumption that any constitutional question can be raised.

The Constitutional Question.

B. This statute in no manner obstructs or interferes with or attempts to regulate commerce between the states, and is not in contravention of article 1st, section 8 of the Constitution of the United States.

It may be conceded that the carrying of the United States mails is a matter relating to inter-state commerce, and that the regulation of it rests with Congress. It is conceded that the Plaintiff was in charge of the mails at the time of his injury. These admitted facts in no manner affect the question. The Supreme Court of the United States has already said in the Price case, 113 U. S. p. 218-222:

> "The Statute of the United States did not give to persons so employed any right as against the Railroad Company which would not belong to any other person in a similar employment by others than the United States, *and therefore no question of Federal authority* is involved in a state judgment in an action brought to recover of a Railroad Company for injuries received while so employed, by its negligence." And in the opinion the Court says: "Nor does the fact that he is in the employment of the United States and that

> Defendant is bound by contract with the Government to carry him, affect the question."

We refer the Court to the case of The Lake Shore & Michigan Southern Railroad Company against the State of Ohio, 173 U. S. p 258, 7th part of the Syllabus.

> "Revised Statutes of the United States authorizing Railroad Companies to carry *Government supplies, mails*, etc., from one state to another, does not prevent the state from enacting such regulations, with respect at least to a Railraod Corporation of its own creation, as are not directly against inter-state commerce, and are not regulations thereof but only incidentally or remotely affect it, and are designed to promote the public convenience."

We have examined with some care the cases cited by Counsel for Plaintiff in Error upon this question, and we find them, without exception, to be examples of an attempt upon the part of a state either to impose a direct tax upon articles of commerce coming into the state, or in attempts to exclude or discriminate against the classes of persons brought into the state or to impose a tax upon the traffic in articles carried from another state, and thus to interfere with inter-state commerce. They all seem based upon the principle that a state cannot legislate in such a manner as to obstruct the free carriage of freight or passengers from state to state, or to enact laws which have for their tendency the regulation of such traffic. These authorities are all reviewed and clearly distinguished in the case of Railroad vs. Kentucky, 116 U. S. p. 700, Opinion of Justice Brown. The Plaintiff's Counsel have cited no cases, nor do I think an adjudicated case can be found, wherein there is the remotest indication that it was ever considered by the United States Supreme Court or by any other Federal or State Court, that a State Statute attempting to define the relative rights and the relative obligations of a Railroad Company

towards its employees and third persons was an attempt to regulate inter-state commerce. This question, however, has been considered recently by the United States Circuit Court of Appeals, sitting in Cincinnati. It was contended that the Ohio Statute of April 2d, 1890, especially that subdivision of it relating to co-employees of Railroad Companies, and making of certain employees superior servants, who at common law had been considered fellow servants, was an attempt to regulate commerce among the states, and for that reason unconstitutional.

Pierce against Van Dusen, 78 Fed. Rep. p. 693, part 2nd of the Syllabus reads as follows:

> "Said Statute is not applicable alone to Railroad Corporations of Ohio engaged in the domestic commerce of the state, but to all Railroad Corporations doing business in Ohio. It does not encroach upon Federal authority nor upon the jurisdiction and powers of the Federal Courts, and is binding upon those Courts." On page 698 the Court says: "The State may do many things affecting commerce with foreign states and among the several states until Congress covers the question by national legislation." (Here the Court cities many instances of such valid legislation.) Continuing on page 700, the Court says: "Undoubtedly the whole subject of the liability of interstate Railroad Companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states. But as Congress has not dealt with the subject, it was competent for Ohio to declare that an employee of any Railroad Company doing business here, including those engaged in commerce among the states, shall be deemed in respect to his acts within this state the superior, not the fellow servant, of other employees placed under his control. * * * Of the validity of such legislation, we entertain no doubt."

As we have already seen, the Statute of Pennsylvania which we are considering, does not affect the question as

to whether or not the Plaintiff was a passenger. It merely provides that if the Plaintiff is lawfully engaged or employed to work upon the car of the Railroad Company, and he is not employed by that Company, that his rights shall be only such as are given to employees under similar circumstances. The Statute, in its most usual application, does not affect persons riding upon trains at all, but as will be seen later, has been applied by the Courts to affect the rights of that very numerous class of persons, who, not being employees of Railroad Companies, are yet employed by third persons to work around the roads, works, depots and cars of Railroad Companies. As we have seen, however, it has been construed to extend to postal clerks, who come directly under the letter of its provisions. Now, we suppose it to be perfectly clear that the legislature of a state may prescribe the duties which a Railroad Company within the limits of that state owes to its passengers, to its employees *and to third persons;* and if the State Statute is such that persons working upon trains coming into the state have fewer rights than they had while passing through other states, the local Statute governing their rights can in no manner be said to interfere with the commerce between states; it neither taxes, obstructs, hinders nor prevents a person from freely coming into the state. We suppose it to be entirely clear that a state legislature might enact a law providing that there should be *no liability* on the part of a Railroad Company to a person injured in that state while riding upon a gratuitous pass, waiving negligence. We know that the laws of the various states differ materially in this respect, yet not for that reason would any lawyer maintain that such Statute attempted to regulate inter-state traffic.

N. P. R. R. Co. vs. Adams, 192 U. S. 440.

In this case Adams was an inter-state passenger.

Boering vs. C. B. Ry. Co. 193 U. S. 442.
Duncan vs. Maine Ry. Co. 113 Federal 508.

We presume that a state might entirely cut off the right of a beneficiary to recover for wrongful death and such an act might by a parity of the reason indulged in by Plaintiff's Counsel, *deter mail clerks from coming into the state* lest, if they be killed, their heirs would have no right to compensation, yet no Court would hold that such an act attempted to regulate or interfere with inter-state commerce.

Sherlock vs. Alling, 93 U. S. 99.

This was a case brought by Charles Alling, Administrator, to recover against a steamboat company, for the unlawful killing of the decedent in Indiana. Defense was interposed that the decedent was an inter-state traveller; that the statute of Indiana imposed a liability on the carrier for wrongful death, which did not exist in Kentucky, or under the Federal Laws; that such a statute *therefore attempted to regulate inter-state commerce.* It will be observed that such is the identical contention made by plaintiff in this case. The syllabus of the case is as follows:

> "Until Congress makes some regulation touching the liabilities of parties for marine torts resulting in death of the persons injured, the Statute of Indiana, giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the State; and, as thus applied, it constitutes no encroachment upon the commercial power of Congress.
>
> "The action of Congress as to a regulation of commerce, or the liability for its infringement, is exclusive of state authority; but, until some action is taken by Congress, the legislation of a State not directed

against commerce or any of its regulations, but relating generally to the rights, duties and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or interstate commerce, or persons engaged in such commerce."

Court goes on to say, Justice Field, page 102:

"In conferring upon congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

And upon the preceding page 101, the court goes on carefully to distinguish between such laws as really affect and impede commerce, or those which only indirectly or in a remote or fanciful degree, can be said to have that tendency.

The Statute of Pennsylvania in no manner either prevents or restrains the rights of postal clarks to travel into the state on mail cars in the performance of their duties.

A case illustrative of our contention will be found in 169 U. S., p. 133, Railroad Company vs. Solon as follows:

"The rules prescribed for the construction of Railroad Companies and for their management *and operation*, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local laws. They are not in themselves regulations of inter-state commerce. Second:—A State Statute prohibiting contracts to exempt a Railroad Company from liability as a common carrier, is not in any just sense a regulation of commerce or void as to inter-state business."

And on page 137 the court says:

"A carrier exercising his calling within a particular state, although engaged in the business of inter-state commerce is answerable according to the law of the state for acts of non-feasance or of mis-feasance committed within its limits * * * * so long as congress has not legislated upon that particular subject,

they are rather to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

Directly in point we cite the following:

17 Am. Eng. Ency. of Law, 2d Ed., p. 75 and p. 95.

93 U. S. Supreme Court Reports, 99.

"A state may lawfully provide by statute for the examination of locomotive engineers and the licensing of them."

124 U. S., 465.

Require such engineers to be examined from time to time with respect to their ability to distinguish colors.

128 U. S., 96.

Prescribed regulations for the receipt and delivery of despatches by Telegraph Companies.

172 U. S., 650.

Forbid the running of freight trains on Sunday.

163 U. S., 299.

Require railroad companies to fix their rates annually for the transportation of passengers and freight; post copies of rates in their stations.

17 Wallace, 560.

Regulate the heating of passenger cars.

165 U. S., 628.

Forbid the consolidation of parallel or competing lines.

161 U. S., 677.

Require railroad passenger trains to stop at every station of 3,000 inhabitants.

173 U. S., p. 285, wherein the court says:

> "The power exists in each state by appropriate enactments not forbidden by its own or the Federal Constitution, to regulate the relative rights and duties of all persons and corporations within its jurisdiction so as to provide for the public convenience and the public good."

A State Statute imposing liability for death by wrongful act, does not violate the commerce clause.

Stephen Bird Ex. vs. Chas. Alling Admr.

93 U. S., 99.

Nor requiring *mail trains* to signal.

90 North Western, 358.

Nor compelling inter-state *mail trains* to stop at county seats.

143 Ill., 434.

166 U. S., 427.

We therefore submit with confidence that congress not having legislated on this particular subject until long subsequent to the trial of this cause, the Pennsylvania Statute under consideration in no manner violates the commercial clause of the Federal Constitution, or the clause relating to the establishment of post roads.

C. The act of April 4th, 1868, does not violate the Fourteenth Amendment of the Federal Constitution.

For thirty-five years this statute has ruled all cases brought against Railroad Companies by third persons whose work or employment brought them in contact with the Railroad Companies' employees and subjected them to the same risks. It has been construed, enforced or distinguished by the Supreme Court of Pennsylvania in very many adjudicated cases arising out of a wide range of circumstances. In its most frequent application, however, the statute has been invoked in cases brought by the employees of Manufacturing Companies or by persons who were obliged to work upon the cars or tracks or on the premsies of the Railroad Company, and whose work subjected them to precisely the same risks as the work of the railroad employees themselves. Among the adjudicated cases are the following:

Kirby vs. R. R. Co., 76 Pa. St., 506.
Mulhern vs. R. R. Co., 81 Pa. St., 193.
Rickard vs. R. R. Co., 89 Pa. St., 193.
R. R. Co. vs. Calvin, 118 Pa. St., 230.
Stone vs. R. R. Co., 132 Pa. St., 206; 104 Pa. St., 511.
Cummings vs. R. R. Co., 92 Pa. St., 82.
Fleming vs. R. R. Co., 134 Pa. St., 478.
Pa. Co. vs. Price, 96 Pa. St., 256
Spisak vs. R. R. Co., 152 Pa. St., 281.
Miller vs. R. R. Co., 154 Pa. St., 473.
Christman vs. R. R. Co., 141 Pa. St., 604.
R. R. Co. vs. Kirk, 90 Pa. St., 16.
Traction Co. vs. Orbann, 119 Pa. St., 37.

It is singular that in the oft repeated adjudications it

has not occurred to courts or lawyers that this statute contravened the fourteenth amendment to the Constitution of the United States:

> "Long aquiescence by a state in the enforcement of a statute and the repeated enforcement of it by the courts of that state, is a strong argument against the unconstitutionality of it when attempted to be raised."
>
> 8 Cyc. of Law and Prac., 737.
>
> 17 Ency. of Law 2d Ed., P. 77 and on P. 738 note:
>
> "An act of the legislature supported by a long line of adjudication and treated by the government as constitutional, will not be inquired into."
>
> 11 Calif., 175.

The constitutionality of this statute has been challenged in the case of Kirby vs. the R. R. Co., 76 Pa. St., 506, Railroad vs. Price, 96 Pa. St., 256 and Miller vs. R. R. Co., 154 Pa. St., 473. The latter case went to the Supreme Court of the United States and is reported in 168 U. S., 131. In the Kirby case its constitutionality was challenged upon the ground that it deprived the plaintiff of his property "without due process of law" in contravention of the Constitution of the State of Pennsylvania. It will be noticed in this connection that the clause of Pennsylvania's Constitution (quoted in the Kirby case and in the Miller case, reported in the United States Supreme Court) is in substance and effect the same, securing the same rights as the similar clause in the fourteenth amendment to the Federal Constitution. Such being the case, we suppose that a statute which is not violative of the Pennsylvania Constitution does not violate the ger-

mane provision of the fourteenth amendment to the Federal Constitution.

State vs. Ferris, 53 O. S., 314, 4th Part of Syl.

And particularly on page 341, opinion of court as follows.

> "As to the first section of the Fourteenth Amendment to the Constitution of the United States providing that no State shall deny to any person within its jurisdiction the equal protection of its laws, it is sufficient to say that the provisions of this section of the Federal Constitution are not broader than the second section of our bill of rights and that therefore a statute upon this subject, authorized by our bill of rights, would not be in conflict with this section of the Constitution of the United States."

That part of the Pennsylvania Constitution under consideration, Article 1st, Sections 1 and 2, are as follows:

> "All men have certain inherent and indefeasible rights among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." And also, "that all courts shall be open and every man having an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or delay."

In what broader language, we ask, could a citizen's right to redress by due process of law be secured to him?

We suppose, therefore, that where a statute has formed the basis of oft repeated adjudication in a state and has twice been declared by the Supreme Court of that state to be in harmony with its constitution, whose provisions are as broad as the kindred provisions of the Federal Constitution, that the Federal Court will not declare that statute to be

violative of the provisions of the Federal Constitution in the absence of the most grave and weighty reasons imperatively moving the court to that conclusion.

We may say further, by way of preface, that while to an Ohio lawyer the wisdom or expediency of this statute may not, at first blush, be entirely apparent, yet with that question the judiciary has no valid concern.

Am. Eng. Ency. of Law, 2d Ed., pp. 1086 and 1087 and many cases cited therein.

Coming now to consider further the statute in its relation to the Fourteenth Amendment to the Federal Constitution:

First:—It does not deprive the plaintiff of property without due process of law, and does not abridge his privileges and immunities as a citizen, or deprive him of his right to make contracts.

It does not deprive the plaintiff of property without due process of law. The statute under consideration was passed some time prior to the adoption of the Fourteenth Amendment. If it be conceded that the validity of this statute is to be measured according to its operative effect, and its legality determined by the fourteenth amendment, which became operative subsequent to its passage which question we desire to submit, in passing without argument, yet it must be apparent that the plaintiff has been deprived of no property rights by the statute. The contract between the railroad company and the United States Government for the carriage of its mail, under Section 4000 of the Revised Statutes, was made long subsequent to 1868. The Federal Statute above quoted did not provide for any compensation to be paid by the government to the railroad company for the transporta-

tion of mail agents but in district words provided that there *should be no extra charge therefor*, and as this Supreme Court has said in the Price Case, 113 U. S., 222, that statute (4000) "did not make the person so employed a passenger, nor give him any rights because he was a mail agent."

Therefore the contract made by the Pittsburg and Lake Erie Railroad Company with the United States Government, under the provisions of which, long years afterwards, Martin began to distribute mail in one of the defendant's cars, neither at the time of the making of the original contract, nor at the time that Martin voluntarily sought employment, afforded him any redress for injuries suffered in Pennsylvania through the sole negligence of the company's inferior servants, as distinguished from the personal negligence of the railroad company. Martin had no *propety rights* at the time of his entering into the service, or at the time of his going into the State of Pennsylvania and was not deprived of any by this statute. *Neither was he deprived of the right to make a contract.* It may be conceded that a statute which in effect deprives an individual of the right to make a beneficial contract would deprive him of a property right. The authorities cited in the plaintiff's brief relate to statutes which expressly prohibit the making of a contract of labor, exceeding a certain limited number of hours per day and can afford us little aid upon this proposition. In all those cases there will be found an express statutory inhabition against the making of a contract. What is there in the statute of Pennsylvania which would have prevented the railroad company from waiving, if it so desired, the immunity granted to it by the statute of 1868 and of entering into a contract with Martin or any other of the thousands of other persons in dissimilar employments embraced within the purview of the statute, securing to them redress for injuries inflicted by the

subordinate servants of the railroad company? What is there that would have pevented Martin from entering into such a contract with the railroad company, as a condition precedent to his acceptance as Federal Postal Clerk? To cite the extract quoted in plaintiff's brief, "Parties may voluntarily contract to do what no legislature would have the right to compel them to do."

Railway vs. Smith, 173 U. S., 684-693.

As we have already stated, a postal clerk under the common law as it is proclaimed in the State of Pennsylvania, while at work on a railroad train never sustained the relation of a passenger to carrier. That is made clear to us by the Price case (96 Pa. St., 256). At the time, then, of entering into his contract of employment with the government and at the time of accepting his assignment to distribute mail in the State of Pennsylvania, the plaintiff was obligated to know that while in said state he had none of the rights of a passenger, whatever his rights may have been in other states, and this without any regard whatever to the statute we are considering. He was deprived of no property rights by virtue of this statute, nor is he denied any redress which he may have by due process of law, and no privilege or immunity to be considered a passenger, which he might claim to have is taken from him by this statute, but is the result of the declaration of what the common law of the State of Pennsylvania is, made long years ago by the Supreme Court of that State and the Supreme Court of the United States. The statute does not deny to the plaintiff a resident of Ohio, any rights of redress against the railroad company, which he would have if he were a resident of Pennsylvania. It simply legislates as to the rights of that large class of persons, in-

cluding the plaintiff, who voluntarily subject themselves to the same risks taken by the railroad employees, and limits their rights to an assumption of those risks. We think there can be no question that State Statutes can make the *peculiar circumstances which surround particular persons the ground for the imposition of certain liabilities* or the relief from certain liabilities. (See 7 Cyc. of Law and Procedure, title Constitutional Law, p. 1052 and cases cited.) A state may enlarge the liability of a master for the negligence of a servant without depriving him of property without due process of law (8 Cyc. p. 1098; 51 Conn., p. 461; 127 U. S., p. 205—Case of M. P. R. R. Co. vs. Mackey.

The syllabus of which is as follows:

> "The law of Kansas making a railroad company liable to an employee for the negligence or mismanagement of other employees or agents of the same company is not in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it deprives the company of its property without due process of law and denies to it the equal protection of the laws.
>
> Legislation which is special in its character is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed.
>
> Corporations are persons within the meaning of the amendment." (Missouri Pacific vs. Mackey.)

And we doubt not the converse of this proposition is true that a court may diminish by statute the employer's liability by a valid enactment, and the fact that this statute may be considered to be in derogation of the common law in that it limits the rights of third persons who accept the risks of employees, to the rights of employees, in no manner deprives

them of any property right or of any process of law, since their service, under those circumstances is purely voluntary.

Second:—This statute does not deny to the plaintiff the equal protection of the laws.

This statute is clearly within the constitutional rights of the legislature of Pennsylvania or of any other state to enact laws which operate equally upon all of a certain class and which effect all persons pursuing the same business under the same conditions, alike.

10 Law Reports Annot. 135.
113 U. S., 27.
127 U. S. (See pp. 208 and 209.)
6 Am. Eng. Ency. of Law, 2d Ed., 970.
99 U. S., 718.
127 U. S., 678 (3d Part of the Syl.)
18 Law Rep. Annot. 729.
33 Law Rep. Annot. 589-593.
15 O. S., 573.
63 O. S., 202.

As was said by the court in the latter case, page 209:

> "If the law under consideration operates equally upon all who come within the class to be affected, embracing all persons who are or may be in like situation and circumstances, and the designation of the class is reasonable, not unjust, capricious or arbitrary, but based upon a real distinction, the law does operate uniformly."

We are aware that statutes of this nature must not be capricious, arbitrary or unreasonable, but the *very large discretion* accorded to the state legislatures and recognized by the Federal Courts may be evidenced by a quotation from a few of the adjudicated cases.

> "What such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power of the state, and *unless the regulations are so utterly unreasonable and extravagant in their nature and purpose* that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interferred with or destroyed without due process of law, they do not extend beyond the power of the state to pass and they form no subject for Federal interference."

Gundling vs. Chicago, 177 U. S., p. 188, opinion of Justice Peckham.

> "Notwithstanding these cases the general rule holds good that whatever is contrary to public policy or inimical to the public interest is subject to the police power of the state and within legislative control, and in the exercise of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."

Louisville Ry. Co. vs. Kentucky, 161 U. S., p. 701, Opinion of Justice Brown. See also 169 U. S., 381-388-392.

The reason of this statute

is fully elucidated in the Kirby and Price cases already referred to. In the Price case the court goes on to say, in substance, that before the passage of the statute, that large class of persons who work shoulder to shoulder with railroad men, upon the cars, tracks or premises of railroad companies, while they voluntarily subjected themselves to exactly the same risks from the negligence of the men they work with, if injured by an employee had a remedy against the company, while the company's employees, if injured by the negligence of such third persons, had no remedy against the company. The court continuing, says:

"Yet he (the employee) was in daily peril of injury from the negligence of persons of this third class. The legislature doubtless saw that it was unjust to give the non-employees such an advantage, and also that the company should be held liable in damages to such persons, who although lawfully upon the road were not under its contract (of employment). The Act of 1868 places persons in the third class upon the same plane as the employees of the company. There is strict justice in this. No good reason can be shown why the non-employees should have higher rights than the employees * * they enter upon the same dangerous employment with full knowledge of its perils and of their legal rights in case of injury. The rule which prevents a recovery by an employee for the negligence of the fellow servant is based upon the soundest principles of public policy. Railroad accidents are usually the result of the carelessness of employees. * * * So long as employees understand that they take their lives in their hands in entering upon their duties, and that their own safety, as well as the welfare of their families, depends upon their care and vigilence, the traveling public will have a reasonable assurance of safety. *The rule that no recovery can be had for the negligence of a fellow servant necessarily tends to increase vigilence on the part of the employees, and to that extent contributes to the public safety. Properly administered, it is wise and just.*"

In other words, the reason of the court proceeds upon this sound basis, that fellow servants knowing that they cannot recover damages for the negligence of each other, are hereby, each of them, induced to a higher degree of care, vigilance and attention on his own part, both to avoid inflicting injury upon his fellow servant and to avoid for himself the consequences of his fellow servants' negligence, and furthermore tends to increase his vigilence and prompt him in his duty to observe and report the negligence or reckless act of another tending to expose him to danger, and that his added degree of care results not only in greater safety to

the servant, but in an increased efficiency and assurance of safety to the traveling public; and proceeding further, *that precisely the same motive and incentive to safety exists in regard to those third persons who work alongside the servants of the railroad company*, perfom duties of a similar character and in the same places, and who are subjected to the identical risks, that they will be led to exercise a higher degree of care and vigilance for their own safetly and the safety of others, if their rights are limited to the rights of those who do the same work, and are subject to the same hazards, to-wit, the railroad employees. Further amplified in the Kerby case, 76 Pa. St., 509, the court says:

> "In what respect does this law trench upon this guarantee, or indeed on any other in the constitution? The person to be affected by it must be one lawfully engaged or employed on or about the road, etc. To be thus engaged he must be there by his own consent. He is, therefore, voluntarily there to perform some act or business connected with the road or its works. He knowingly assumes a relation regulated by the law, and thus places himself under the operation of the law, which governs the relation. He is not bound to assume the relation, and when he does, he acts with his eyes open. The law is not retrospective, and takes from him no remedy for an injury already sustained. The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the state as the conservator of the lives, security and property of her citizens. It is a police regulation, which, having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert his proper remedy against the person whose act or negligence does him the injury, the law says to him, that the legal principle of respondeat superior shall have no place in this particular relation; that as a matter of proper policy for the good of all, those who vol-

untarily enter into employments alongside of the servants of a railroad company, shall have just the same remedies for injuries happening in the employment that these have, and none other. In doing this, no fundamental right of the person thus voluntarily venturing, is cut off or struck down. The liability of the company for the acts or omissions of others, though they be servants, is only an offspring of law. The negligence which injuries is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company, for reasons of policy, can remove the imputation from the master and let it remain with the servant, whose negligence causes the injury. It is unnecessary to refer to the long line of decisions, asserting the general power of legislation when unforbidden in the constitution. Finding no prohibtion against such a regulation of persons lawfully engaged or employed upon a railroad or its works, the section quoted of the Act of 1868 is not unconstitutional."

The Supreme Court of Pennsylvania adhered to its decision, in the case of Miller vs. The Railroad Company, 154 Pennsylvania State, 473. That case went to the Supreme Court of the United States where it was undertaken to attack the statute upon Federal constitutional grounds. The court, however, Justice Fuller rendering the opinion, declined to consider the question, for the reason that it did not appear to have been mooted in the State Court.

See Miller vs. Cornwall Railroad Co., 168 U. S., 131.

Now who shall say that this classification is arbitrary? We understand the rule to be, and it has been well illustrated in the numerous cases cited in brief of plaintiff's counsel, "That the classification must be based upon some difference which bears a just and proper relation to the attempted classification and the object sought to be accomplished." Apply-

ing this test, it will be entirely evident that the "difference" in the remedy is predicated upon the fact that this class of third persons who are engaged at work upon the roads, cars or premises of a railroad company, incur all, or nearly all of the risks incurred by railroad employees themselves. The statute differentiates this class from all other third persons not connected in their work with the railroad company. Proceeding further with this test, this difference "bears a just and proper relation to the classification," that is, the class of persons affected by this Act, bear an entirely different relation to the railroad company and their servants, from that sustained by persons in general, and under the power to legislate for the advantage of the public, the legislature prescribed certain limitations upon the legal rights of those who voluntarily assume such risks, from motives of public policy, which have already been fully discussed. We suppose that the Supreme Court of Pennsylvania was entirely competent to say whether this difference and this limitation upon the rights of those assuming these great hazards did, in fact, bear a just and reasonable relation to the purpose of the act, and it should perhaps be sufficient upon this subject to say, that after full consideration, being perhaps better advised as to the needs and circumstances of her people than we can hope to be, the court has, in fact, deemed it to be a fair and just classification having a real relation to the object sought and a plain tendency to accomplish it. It should be said in this connection that this statute in no manner tends to release the railroad company from the performance of any of those duties owing by a master to a servant, such as the hiring of competent employees and furnishing them with safe instruments of labor and a safe place to work. Any breach of duty of this kind gives rise to the same liability in favor of this class of persons as if they were employees and this by virtue

of the language of the statute. While the weight of the reasoning supporting this classification is perhaps more convincing when applied to the very many other cases coming within its provisions, it must be remembered that this particular case of a postal clerk presents an isolated and infrequent instance of the application of the statute. When we read the cases cited in this brief invoking the aid of this statute, which have been decided by the Supreme Court of Pennsylvania and which illustrate the most frequent application of the statute, the reason of it becomes clearly apparent. For example, there is reason in saying that the employee of a furnace company who goes on the cars of a railroad company to assist a train crew in unloading iron ore on a siding, doing precisely the same work required of railroad employees and subjected to the same risks, if he knows that his rights are those only of an employee of the railroad company, it will not only induce a degree of care and vigilance on his part that he be not injured by the negligence of the company's employees, but also a watchfulness to observe neglect on their part and to make complaint of it, all of which tends strongly to a greater safety. Or in the case of a private railroad crew of a manufacturing company running a private engine or private cars on railroad tracks, assisting in the receiving or delivering of cars from that railroad company, and performing work which cannot in any manner be distinguished from the work of the railroad company's employees, since they assume the same risks they should be subjected to the same rule, and if there be a high motive of public policy in the rule which denies redress to a servant for the negligence of his fellow servant, that public policy applies equally to the non-employee who voluntarily subjects himself to the same risks by doing

the same manner of work at the same place and under the same circumstances. The plaintiff in this case was not a passenger, and therefore, is not excluded from the operation of the Statute by the last provision of it. He was employed to work upon this car and is, therefore, included in the Statute; and if it were true that as to him individually the potency of the argument and reason of the Statute is not so clearly apparent, that in no manner affects the validity of the Statute, which in its wide application makes for the greater safety of all.

In the express messenger case, 176, U. S. p. 498, the Court arrives at the conclusion that it is *not against public policy* to permit an express messenger to expressly waive all right of compensation arising from the negligence of the railroad company's employees; thus, on page 514, quoted from the case of Bates against Old Colony Railroad Co. 147 Mass. 255 as follows:

> "If an express messenger holding a season ticket from a Railroad Company and desiring to ride for the conduct of the business in a baggage car, agrees to assume all risks of injury therefrom and to hold the Company harmless therefrom, the agreement is not invalid * * * and he cannot recover for injuries caused by the negligence of the Company's servants. * * * The fact that the Plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there, shows more clearly that the contract by the express company and the Plaintiff was *not unreasonable* or against public policy. He was there as a servant *engaged with the servants of the Railroad Company in the service of transportation on the road.* His duties were substantially the same as those of the baggage master in the car, the latter relating to merchandise carried for passengers, the former merchandise carried for the express company. *His actual relation to the other servants of the railroad corporation engaged in the transportation were substantially*

> *the same as those of the baggage* master and would have been the same had he been paid by the corporation instead of by the express company; had the railroad done the express business the messenger would have been held by law to have assumed the risks of the negligence of the servants of the railroad."

This comparison of the relative duties of an express messenger and the railroad employees applies with equal potency to a postal clerk; his relative position and work is the same—and if the one may by express contract make himself in legal effect a fellow servant of the railroad employees, we suppose that a *statute based upon the same public policy* will not be open to the criticism of being arbitrary or capricious.

It is strenuously asserted, however, by plaintiff's counsel, that the Supreme Court of Pennsylvania has declared it to be against the public policy of the State, to permit a passenger by contract, to waive his right to compensation for injury, resulting from the carrier's negligence. This point we concede; but we still insist that it has no where been held in Pennsylvania, that a person whom the Supreme Court of that State has held *not to be a passenger*, may not contract for free carriage and be bound by his contract, without running counter to the public policy of the State. The position of Martin upon the train was analogous to that of the man, Voigt, the express messenger, whose case against The Baltimore & Ohio Railroad Company is reported in 176 U. S., 498. And to repeat our argument: If it was not against the public policy of the National government for Voigt to waive liability for negligence, the Supreme Court of the United States will not declare that a police regulation of the State of Pennsylvania, which accomplishes the same result, is against the public policy of the Nation. That it is not

contrary to public policy for a person riding upon a gratuitous pass, to waive negligence of the Company.

See N. Pacific Railroad Co. vs. Adams, 192 U. S., 440.

Boering vs. Chesepeake Beach R. R. Co., 193 U. S., 442.

Whatever may be the policy of other states, it has from the beginning been the settled public policy of Pennsylvania, to give the widest operatives effect to the defense of fellow-servant. In Pennsylvania, every employee of a common master is a fellow-servant, except heads of entire departments, over whom the master exercises no supervision or control, and there are no suprerior servants in Pennsylvania, save and except those heads of departments. The reason of these rules is sufficiently set forth in the opinion of the Supreme Court of Pennsylvania, in the Kirby case. While this rule of law and this state policy differs widely from the policy of Ohio, wherein every employee who exercises any authority is the superior of almost every other who exercises none, and is directly contrary to the policy of certain states, wherein the defense of fellow-servant has been abrogated by statute, it is sufficient for our purpose to know that the policy of giving to the fellow-servant rule the widest scope and effect has been considered by the courts of Pennsylvania to be calculated to induce the highest degree of care, vigilance and attention, upon the part of the operatives themselves for their own safety.

It will therefore be seen that the policy of including those workmen who voluntarily subject themselves to similar risks, in the same rule of liability as the Company's employee themselves, and of according to them similar rights, is entirely consistent with the settled policy of the State of

Pennsylvania in nearly a century of judicial history, to-wit, a recognition of the soundness of the policy which prevents a recovery by one servant for the personal negligence of another, even though that other be in control and direction over the injured servant.

Railroad vs. Bell, 112 Pa., St. Rep. 400.
Duffy vs. Oliver, 131 Pa., St. Rep. 203.

All this upon the theory that it induces a greater degree of care upon the part of each servant for his own protection and the protection of his fellow-workmen. Nor is the statute inconsistent with a public policy which prevents the carrier from contracting for immunity against injury to a paying passenger. That policy is entirely separate and apart from the policy which exonerates the master from liability for the personal negligence of a servant, whereby another, assuming similar risks, is injured.

Nor will it be deemed by this court necessary to refute, by argument, the proposition that because in any particular case the injured servant or the injured third person assuming the risks of a servant, does not in fact *know* or may never in fact have *seen* the particular servant who injures him, that this fact should make any difference with the practical application of the general principle which, in its general scope, rests not upon the particular opportunity for observing the negligent servant in any special instance, but which rests upon the *working out of a general system*, making for greater vigilance upon the part of every employee. If we seek for the reason of the rule it will be found deep in the common law. In the leading case on the subject, Priestly vs. Fowler, 3 M. & W., 1, Lord Abinger says:

"In fact, to allow this sort of action to prevail,

would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford."

The irresistable logic of this principle is amplifted in the opinion of Chief Justice Shaw, in Farwell vs. Boston & Worcester, 4 Metcalf, 49.

> "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned."

It is no new thing in our common law to extend the principal of fellow-servant to include employees of third persons, who by their work are in contact with the servants of the master who is made defendant and to deny liability to the servants of such third persons upon the principle, *not that the assume the risk of the service*, but that the public policy of the State was best subserved by a rule denying liability in such cases and that its tendency was to induce a greater degree of vigilance upon the part of all operatives engaged in a common work.

Hawkins vs. Standard Sugar Refinery, 122 Mass., 400.

Johnson vs. Boston, 118 Mass., 114.

This Statute is criticised in that it applies only to railroad companies, and is not applicable to other car-

riers of freight and passengers, such as steamship companies, stage coaches and carriers of marine freight. It is perhaps a sufficient reply to this to quote the language of the Ohio Supreme Court in 63 O. S., p. 210.

> "Nor is it an objection to a Statute that it does not apply to all persons who might, by any possibility commit the act interdicted. It is for the legislature to determine how far to go in order to afford the desired protection to society. The exemption of some where it does not interfere with the rights of others, is not open to objection on constitutional grounds."

Again, when the railroad companies invoked this constitutional amendment to shield them from a Statute substantially wiping out the fellow servant rule in Kansas, upon the ground that it referred *only* to railroad companies and did *not* embrace other kinds of corporations, the Supreme Court said in 127 U. S. 205. Opinion of the Court by Justice Field:

> "The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection therefore, can be made to the legislation on the ground of its making an unjust discrimination. * * * As said by the Court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories."

In this connection the very obvious suggestion occurs—that at all events the Plaintiff is not denied the equal protection of the laws *by the fact that this Statute does not include steam boats.*

There has been no hesitation by the Supreme Court of the United States in upholding legislation *increasing* the

liability of railroad companies, and the fact that such legislation abrogates the common law has never been considered to deny to railroad companies the equal protection of the law. The whole matter has been deemed to come under the head of police regulations committed wholly to the discretion of the state legislature. The extent to which the Court has gone in this direction can be seen by the full collation of authorities cited in:

8 Cyc. of Law and Proc. p. 1078 and 1079.
127 U. S. 205.
127 U. S. 210.
157 U. S. 209.

In each of the foregoing cases, Statutes making railroad companies liable to their employees for the negligence of fellow servants have been sustained upon the theory that the legislature was competent to determine whether or not such a policy induced care upon the part of the company. We suppose that by a parity of reasoning the legislature of the State of Pennsylvania being satisfied that the rule of law which has always been the law of Ohio, denying to servants redress for injuries inflicted by a fellow servant, made for and induced an increased vigilance on the part of the actual operatives of a railroad company, could lawfully include within such rule those who were actually employed about railroad work and upon railroad trains and subject to the same risks and hazards, even though they were not employed by the railroad company. We suppose the fourteenth amendment was not made exclusively for the protection of individuals, the word "persons" as used in that amendment has always been held to apply to corporations as well. And if the Statutes wiping out the common law and increasing the

liability of railroad corporations to the exclusion of others, did not contravene this fundamental law of the land, we suppose that laws upon the same subject, which, in the opinion of the highest State Courts fairly tend to accomplish the same result, to-wit, an increased public safety, cannot be attacked upon any such ground, even though the common law liability of such corporation be thereby diminished.

Cooley on Constitutional Limitations (5th Ed.) p. 716, note.

Counsel for Plaintiff indulge the speculation as to what would be the effect upon the constitutionality of this Statute if its terms were broad enough to exonerate the Railroad Company from liability to passengers or to the soldiers of the United States being transported for hire. While queries of this nature must appear to the Court in a great degree profitless, it would not be difficult for one possessed of a fertile fancy to construct in imagination a Statute which would be open to the vice of being an arbitrary and unjust encroachment upon the rights of individuals under the pretense of conserving a wise public policy. It is a sufficient reply to such conjecture, that the Statute by its very terms, embraces only that class which is "lawfully *engaged* or *employed* upon the premises or trains of a Railroad Company," that it expressly excludes passengers and that by no stretch of the imagination could it be so applied as to include commercial travellers, or in fact any other class of persons as to whom the railroad company owes the duty of the highest degree of care in their transportation.

We think it hardly necessary to notice the stricture which a certain popular law book author is said to have passed upon this statute, quoted in the plaintiff's brief. We have never heard that author accused of any deep knowl-

edge of Constitutional law and certainly the argument that he advances, to-wit, "that no State in the Union would have adopted this statute if it had been put to popular vote," can not be said to add weight to his remaining remarks upon the subject. The constitutionality of a statute can hardly be made to turn upon the popular approval of the multitude.

In conclusion we submit that this Statute violates neither the letter nor the spirit of our constitution and the judgments of the lower courts are without error.

James P. Wilson,

Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 66.—October Term, 1906.

Reuben L. Martin, Plaintiff in Error, vs. The Pittsburg and Lake Erie Railroad Company. } In error to the Supreme Court of the State of Ohio.

[December 3, 1906.]

Reuben L. Martin brought this action to recover compensation for personal injuries. At the time Martin was injured he was on a train of the railroad company, in the employ of the United States as a railway postal clerk on a route extending from Cleveland, Ohio to Pittsburg, Pennsylvania. The injuries arose from the derailing in Pennsylvania of the train, by the negligence of the crew of a work train, in permitting a switch leading to a side track to be open. Among other defenses the company pleaded a law of Pennsylvania passed April 4, 1868, (P. L. 58,) which, it alleged, was applicable and relieved from responsibility. In reply the plaintiff denied the existence and applicability of the statute moreover, and defended on the ground that the statute, if existing and applicable, was void, first, because contrary to the power delegated to Congress to establish post offices and post roads; second, because repugnant to the commerce clause of the Constitution; and, third, because in conflict with the equal protection and due process clauses of the Fourteenth Amendment, and also the clause prohibiting a State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

On trial before a jury the court held the statute in question to be applicable and valid, and hence operative to defeat a recovery. A verdict and judgment in favor of the railroad company was severally affirmed by the Circuit Court and by the Supreme Court of the State of Ohio.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the Court.

We quote the Pennsylvania statute of April 4, 1868, upon which the case turns:

"Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, It is hereby enacted by the authority of the same that when any person shall sustain

personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car, therein or thereon, of such company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe, provided that this section shall not apply to passengers."

As the application of the statute, if valid, presents no Federal question, we are unconcerned with that matter, although it may be observed in passing that it is conceded in the argument at bar that under the settled construction given to the statute by the Supreme Court of Pennsylvania the plaintiff, as a railway postal clerk, was not a passenger and had no greater rights in the event of being injured in the course of his employment than would have had an employe of the railroad company.

Was the application of the statute thus construed to a railway postal clerk of the United States in conflict with the power of Congress to establish post offices and post roads?

In *Price* v. *Pennsylvania Railroad Co.*, (113 U. S. 221,) this question was in effect foreclosed against the plaintiff in error. That case was brought to this court from a judgment of the Supreme Court of Pennsylvania, (96 Pa. St. 258,) holding that a railway postal clerk was not a passenger within the meaning of the Pennsylvania act, and hence had no right to recover for injuries suffered by him in consequence of the negligence of an employe of the company. The Federal ground there relied upon was substantially the one here asserted, that is, the power of the Government of the United States to establish post offices and post roads and the effect of the legislation of Congress and the act of the Postmaster General in appointing mail clerks thereunder. After fully considering the subject the case was dismissed because no substantial Federal ground was involved, the court saying (113 U. S. 221):

"The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the Government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any *right*, as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States."

This brings us to the second contention, the repugnancy of the Pennsylvania statute to the commerce clause of the Constitution. It is apparent

from the decision in the Price case, just previously referred to, that in deciding that question we must determine the application of the statute to the plaintiff in error, wholly irrespective of the fact that at the time he was injured he was a railway postal clerk. In other words, the validity or invalidity of the statute is to be adjudged precisely as if the plaintiff was at the time of the injury serving for hire in the employ of a private individual or corporation.

Under the circumstances we have stated, the case of *Pennsylvania Railroad Co.* v. *Hughes*, (191 U. S. 477,) clearly establishes the unsoundness of the contention that the Pennsylvania statute in question was void because in conflict with the commerce clause. In that case a horse was shipped from a point in the State of New York to a point in the State of Pennsylvania under a bill of lading which limited the right of recovery to not exceeding one hundred dollars for any injury which might be occasioned to the animal during the transit. The horse was hurt within the State of Pennsylvania through the negligence of a connecting carrier. In the courts of Pennsylvania, applying the Pennsylvania doctrine which denies the right of a common carrier to limit its liability for injuries resulting from negligence, a recovery was had in the sum of ten thousand dollars, the value of the animal. On writ of error from this court the judgment of the Supreme Court of Pennsylvania was affirmed, it being held that, at least in the absence of legislation by Congress on the subject, the effect of the commerce clause of the Constitution was not to deprive the State of Pennsylvania of authority to legislate as to those within its jurisdiction concerning the liability of common carriers, although such legislation might to some extent indirectly affect interstate commerce. The ruling in the Hughes case in effect but reiterated the principle adopted and applied in *Chicago, Milwaukee etc. Ry. Co.* v. *Solan*, (169 U. S. 133,) where an Iowa statute forbidding a common carrier from contracting to exempt itself from liability was sustained as to a person who was injured during an interstate transportation.

The contention, that because in the cases referred to, the operation of the State laws, which were sustained, was to augment the liability of a carrier, therefore the rulings are inapposite here, where the consequence of the application of the State statute may be to lessen the carrier's liability, rests upon a distinction without a difference. The result of the previous rulings was to recognize, in the absence of action by Congress, the power of the States to legislate, and of course this power involved the authority to regulate as the State might deem best for the public good, without reference to whether the effect of the legislation might be to limit or broaden the responsibility of the carrier. In other words, the assertion of Federal right is disposed of when we determine the question of power, and doing

so does not involve considering the wisdom with which the lawful power may have been under stated conditions exerted.

And the views previously stated are adequate to dispose of the assertion that the Pennsylvania statute is void for repugnancy to the Fourteenth Amendment. If it be conceded as contended that the plaintiff in error could have recovered but for the statute, it does not follow that the legislature of Pennsylvania in preventing a recovery took away a vested right or a right of property. As the accident from which the cause of action is asserted to have arisen occurred long after the passage of the statute, it is difficult to grasp the contention that the statute deprived the plaintiff in error of the rights just stated. Such a contention in reason must rest upon the proposition that the State of Pennsylvania was without power to legislate on the subject, a proposition which we have adversely disposed of. This must be, since it would clearly follow, if the argument relied upon were maintained, that the State would be without power on the subject. For it cannot be said that the State had authority in the premises if that authority did not even extend to prescribing a rule which would be applicable to conditions wholly arising in the future.

The contention that because plaintiff in error, as a citizen of the United States, had a constitutional right to travel from one State to another he was entitled, as the result of an accident happening in Pennsylvania, to a cause of action not allowed by the laws of that State, is in a different form to reiterate that the Pennsylvania statute was repugnant to the commerce clause of the Constitution of the United States. Conceding, if the accident had happened in Ohio, there would have been a right to recover, that fact did not deprive the State of Pennsylvania of its authority to legislate so as to affect persons and things within its borders. The commerce clause not being controlling in the absence of legislation by Congress, it follows of necessity that the plaintiff in error, as an incident of his right to travel from State to State, did not possess the privilege, as to an accident happening in Pennsylvania, to exert a cause of action not given by the laws of that State and had no immunity exempting him from the control of the State legislation.

The proposition that the statute denied to the plaintiff in error the equal protection of the laws because it "capriciously, arbitrarily, and unnaturally" by the classification made deprived railway mail clerks of the rights of passengers which they might have enjoyed if the statute had not been enacted, is without merit. The classification made by the statute does not alone embrace railway mail clerks but places in a class by themselves such clerks and others whose employment in and about a railroad subject them to greater peril than passengers in the strictest sense. This

general difference renders it impossible in reason to say, within the meaning of the Fourteenth Amendment, that the legislature of Pennsylvania in classifying passengers in the strict sense in one class and those who are subject to greater risks, including railway mail clerks, in another, acted so arbitrarily as to violate the equal protection clause of the Fourteenth Amendment.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.